-92-30

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,
Petitioner,

v.

THE STEAMER "LADY ELGIN",
and
THE LADY ELGIN FOUNDATION, INC.,
Petitioner,

and

ILLINOIS HISTORIC PRESERVATION AGENCY, and
ILLINOIS DEPARTMENT OF TRANSPORTATION

Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Seventh Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

Paul N. Keller
Counsel of Record
505 Butler Place
Park Ridge, IL 60068
708/318-5207

Peter E. Hess
Attorney for Petitioner
300 E. Delaware Ave
Wilmington, DE 19801
302/656-1203

David J. Bederman
Of Counsel
Emory University
Law School
Atlanta, GA 30322

QUESTION PRESENTED FOR REVIEW

In an admiralty in rem action, where an intervening state has no colorable claim to the res, is the state immune from judgment under the eleventh amendment?

TABLE OF CONTENTS

Question Presented For Review i

Table of Authorities iii

Opinions Below 2

Statement of Jurisdiction 3

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

The Court of Appeals Erred In Holding That, To Invoke Its Eleventh Amendment Immunity, A State Which Intervenes In An Admiralty In Rem Action Need Not Show A Colorable Claim To The Res.... 7

Conclusion 16

Appendix

TABLE OF AUTHORITIES

Cases

Cobb Coin Co. v. Unidentified, etc. Vessel, 549 F.Supp. 540 (S.D. Fla. 1982). 9
Cobb Coin Co. v. Unidentified, etc. Vessel, 525 F.Supp. 186 (S.D. Fla. 1981). 13
Columbus-America Discovery Group, Inc. v. S.S. Central America, 742 F.Supp. 1327 (E.D.Va. 1990). 10
DSI Corp. v. United States, 655 F.2d 1072 (Ct.Cl. 1981)..16
Dugan v. Rank, 372 U.S. 609 (1963). 11
Edelman v. Jordan, 415 U.S. 651 (1974). 11
Florida v. Treasure Salvors, Inc., 458 U.S. 670 (1982).... 7
Houseman v. Schooner North Carolina, 40 U.S. 40 (1841).....16
In Re New York, 256 U.S. 490 (1921). 10
In Re New York, 256 U.S. 503 (1921). 11
Klein v. Unidentifed, etc. Vessel, 758 F.2d 1511 (11th Cir. 1985). 13
Land v. Dollar, 330 U.S. 731 (1947). 11
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)..... 11
Maritime Underwater Surveys v. Unidentified, etc. Vessel, 717 F.2d 6 (1st Cir. 1983). 9
Marx v. Guam, 866 F.2d 294 (9th Cir. 1989)..... 9
Moore v. American Transportation Co., 65 U.S. 1 (1860)..... 4
Sindia Expedition, Inc. v. The Sindia, 895 F.2d 116 (3d Cir. 1991).....9
Subaqueous Exploration, etc. v. Unidentified, etc. Vessel, 577 F.Supp. 597 (D.Md. 1983). 9
Zych v. The Seabird, etc., et al., 946 F.2d 1072 (7th Cir. 1991). 13

Statutes

28 U.S.C. § 1254(1). 3
28 U.S.C. § 1333 7
43 U.S.C. § 1301 13
43 U.S.C. § 2101 13
Ch. 127 ¶ 801 Ill. Rev. Stats..... 3
Ch. 37 ¶ 439.8 Ill. Rev. Stats..... 3

Regulations

National Park Service, Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116 (Dec. 4, 1991). 14

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,

Petitioner,

v.

THE STEAMER "LADY ELGIN",

and

THE LADY ELGIN FOUNDATION, INC.,

Petitioner,

and

ILLINOIS HISTORIC PRESERVATION AGENCY, and
ILLINOIS DEPARTMENT OF TRANSPORTATION

JOINT PETITION FOR WRIT OF CERTIORARI

Harry Zych, plaintiff below, and the Lady Elgin Foundation, Inc., claimant below, jointly petition this Honorable Court to issue a writ of certiorari to review the April 3, 1992 opinion and judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit, decided April 3, 1992, Zych v. The "Lady Elgin" etc., et al., No. 91-1673, of which petitioners seek review, is reported at 960 F.2d 665 (7th Cir. 1992), and is reprinted in the Appendix hereto, at App. 1, infra.

The memorandum opinion and order of the District Court, dated March 11, 1991, granting the injunction appealed from, is a non-published opinion, which may be found at 1991 U.S. Dist. LEXIS 2962, and which is reprinted in the Appendix hereto, at App. 12, infra.

The memorandum opinion and final judgment order of the District Court, dated Dec. 11, 1990, modified Jan. 4, 1991, is reported at 755 F.Supp. 213 (N.D. Ill. 1991), and is reprinted in the Appendix hereto, at App. 24, infra.

The memorandum opinion and order of the District Court, dated Sept. 13, 1990, dismissing the complaint, in part, which order was later vacated, in part, is reported at 746 F.Supp. 1334 (N.D. Ill. 1990) and is reprinted in the Appendix hereto, at App. 36, infra.

The minute order of the District Court, dated Dec. 12, 1990, vacating the order of Sept. 13, 1990 insofar as it relates to this case, is non-published, and is reprinted in the Appendix hereto, at App. 77, infra.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit dated April 3, 1992. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Illinois State Lawsuit Immunity Act, Ch. 127 ¶ 801 Iil. Rev. Stats., prohibits the State of Illinois from being made a party in any court except the Illinois Court of Claims. The Court of Claims act, Ch. 37 ¶ 439.8 Ill. Rev. Stats., prescribes the subject-matter jurisdiction of the Court of Claims. Both acts are reprinted in the Appendix hereto, at App. 78, infra. The pertinent portions of the Submerged Lands Act, 43 U.S.C. § 1301, are set forth at App. 56. The pertinent portions of the Abandoned Shipwreck Act, 43 U.S.C. § 2101, are set forth at App. 56-57.

STATEMENT OF THE CASE

Facts

The historical facts concerning the Steamer Lady Elgin are briefly recounted in the opinion of the Court of Appeals in this case. (Slip opinion at 2-3, App. 2-3). The ship was the largest and most elegant passenger liner on the Great Lakes when she was lost, on September 8, 1860. The circumstances surrounding her final, fatal voyage and the

aftermath of the tragedy make the Lady Elgin one of the most historically significant shipwrecks of the antebellum period.

The Lady Elgin has once before come to the attention of this Court. In Moore v. American Transportation Co., 65 U.S. 1 (1860), Mr. Justice Nelson had occasion to comment that "The appalling destruction of life in the loss of the . . . Lady Elgin upon [Lake] Michigan [is] still fresh in the recollections of the country". 65 U.S. at 38. But the details of the Lady Elgin's history are not essential to an understanding of this case, and will not be elaborated here.

One fact, however, is crucial. It is that the Lady Elgin is not and never has been an "abandoned" wreck. The Court of Appeals here expressly noted that the ship was insured by Aetna Insurance Company at the time of her loss, that Aetna paid the owner of the vessel for the loss and thereby acquired title to the wreck by subrogation, and that Aetna instructed its agents not to abandon the Lady Elgin. (Slip op. at 3, App. 4). In 1990, petitioner Lady Elgin Foundation purchased title to the wreck from CIGNA Insurance Company, Aetna's successor. (Slip op. at 5, App. 6).

Proceedings Below

Petitioner Harry Zych discovered the wreck of the Lady Elgin in 1989, after years of research and exploration. He filed an in rem admiralty complaint in the District Court, naming only the vessel as the defendant. The District Court issued a monition in rem attaching certain artifacts which Zych had recovered from the wreck, thereby bringing the res into the custody of the court. Zych's complaint sought alternatively a salvage award or an award of title to the res.

The Illinois Historic Preservation Agency and the Illinois Department of Transportation (collectively hereafter "the State"), agencies of the State of Illinois, intervened in the action. The State asserted that the wreck is the property of Illinois, and moved to dismiss the complaint under Rule 19(b) Fed. R. Civ. P. for failure to join a necessary party, namely, the State of Illinois. The State contended that it could not be joined in the in rem action because of its eleventh amendment immunity from suit in federal court, necessitating dismissal of the complaint.

Thereafter, petitioner Lady Elgin Foundation, Inc., an Illinois not-for-profit corporation, filed its claim in Zych's action, pursuant to Rule C(6), Supp. R. For Adm. Pro., asserting its acquisition of title to the wreck from CIGNA.

The District Court then invited the State to address the claim of the Foundation. The State declined to take any position regarding that claim, contending that the eleventh amendment insulates Illinois from the effect of any judgment the court might enter relating to the Foundation's claim. In essence, the State said that it did not care what the District Court did with the Foundation's claim, since any judgment could not be binding on the State.

The District Court then considered the merits of the Foundation's claim. The court found that the historical evidence presented by the Foundation, being archives of Aetna Insurance Company, established that Aetna had insured the Lady Elgin, had paid claims for its loss, and had acquired title by subrogation. Aetna's successor, CIGNA, had then conveyed its title to the Lady Elgin Foundation. The court further found that, because the wreck was never abandoned, the State had no colorable claim to the Lady Elgin. That

being the case, judgment against the State would not be barred by the eleventh amendment. The court held that the Foundation has sole title to the wreck, made that judgment binding on the whole world, including the State of Illinois, and vacated an earlier order dismissing the action as against the State.

Thereafter, Zych moved, on the basis of a salvage contract with the Foundation, for an injunction preventing anyone, including the State, from interfering with his salvage activities, and the District Court issued the injunction. The State then took an interlocutory appeal from the injunction order and raised, as an issue encompassed by the injunction under the doctrine of pendant appellate jurisdiction, the validity of the underlying order finding that the State has no colorable claim to the wreck. The injunction, the State contended, could not be binding on the State because of its eleventh amendment immunity.

The Court of Appeals went directly to the eleventh amendment issue. Whether or not the State has a "colorable" claim to the Lady Elgin is irrelevant, the appellate court held. The mere fact that the State asserts a claim is sufficient to invoke its eleventh amendment immunity and to bar the court from issuing any order binding the State. The appellate court vacated the judgment of the District Court and remanded, declaring that the District Court "may determine the rights of Zych versus the whole world with the exception of Illinois". (Slip op. at 10, App. 11). The Court of Appeals also declared that any litigation between Zych and the State will occur in State court.

Petitioners now seek review by this Court to clarify whether the State's unfounded and insupportable claim to the

res is sufficient, under the eleventh amendment, to prevent the judgment order and injunction of the District Court from binding the State of Illinois.

Jurisdiction Below

Jurisdiction in the District Court was based on 28 U.S.C. § 1333. This is a case within the admiralty and maritime jurisdiction of the federal court, within the meaning of Rule 9(h), for the purposes of Rules 14(c), 38(e) and 82, Fed. R. Civ. P., and Supplemental Rules For Certain Admiralty And Maritime Claims.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Erred In Holding That, To Invoke Its Eleventh Amendment Immunity, A State Which Intervenes In An Admiralty In Rem Action Need Not Show A Colorable Claim To The Res.

I

This case presents an issue left undecided in Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)("Treasure Salvors"). In that case, Justice Stevens, writing for the Court, said

> In ruling that the Eleventh Amendment does not bar execution of

> the warrant, we need not decide the extent to which a federal court, exercising admiralty in rem jurisdiction over property before the court, may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res.

458 U.S. at 697. In this case, the State entered a restricted appearance, not to "voluntarily assert a claim", in the sense of submitting that claim to adjudication, but to invoke its eleventh amendment immunity and bar adjudication of its claim. Thus, the issue left open in Treasure Salvors is directly presented here.

As a practical matter, this issue is much more significant than the question actually decided in Treasure Salvors. The major issue there concerned only the validity of the district court's seizure of portions of the res in the possession of state officials - a narrow question not likely to arise again. In contrast, this case presents what has become the most frequently-occurring and troublesome issue in "treasure salvage" cases: the threshold showing required of a state in order for it to invoke its eleventh amendment immunity where the state claims an interest in (but is not in possession of) the res.[1]

---

[1]In Treasure Salvors, Justice White, writing for the dissent, noted that there is a "controversy" over the applicability of the immunity doctrine where - as here - the sovereign claims ownership of a vessel not in its possession. 458 U.S. at 710 n. 7.

The response to this issue by the federal courts has been inconsistent and confused. For example, in Cobb Coin Co. v. Unidentified, etc. Vessel, 549 F.Supp. 540 (S.D. Fla. 1982), decided two months after the decision in Treasure Salvors, Judge King concluded that the colorability of the State's claim is irrelevant because that suit, an admiralty in rem action in which the State intervened, is not, in any event, "a suit against the State and is not barred by the Eleventh Amendment," 549 F. Supp. at 552, finding direct support for his conclusion in the Treasure Salvors opinion. On the other hand, in Subaqueous Exploration, etc. et al. v. Unidentified, etc. Vessel, 577 F. Supp. 597 (D. Md. 1983) the court held, on similar facts, that "these suits are directly against vessels over which the State of Maryland asserts a claim of title. As such, the essential nature and effect of these proceedings are that they are suits directly against the State of Maryland", which are barred by the eleventh amendment. 577 F. Supp. at 607.

Recently, in Sindia Expedition v. The Sindia, 895 F.2d 116 (3d Cir. 1991), the Third Circuit held, on similar facts, that Treasure Salvors means that ". . . an admiralty in rem action in which a State claims an interest in a res is not an action against the State but merely against the property". 895 F.2d at 126. In contrast, the First Circuit, in Maritime Underwater Surveys v. Unidentified, etc. Vessel, 717 F.2d 6 (1st Cir. 1983), has held that "because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit, . . . when a state asserts title to antiquities lodged within the seabed under its authority, the Eleventh Amendment bars federal adjudication of the state's interest, absent its consent." 717 F.2d at 8. But the Ninth Circuit, in Marx v. Guam, 866 F.2d 294 (9th Cir. 1989), has simply "assumed" that, under Treasure Salvors, a colorable claim

by the government is required to provide a basis for eleventh amendment immunity. 866 F.2d at 307. The Seventh Circuit, in the case at bar, appears to have lined up with the First Circuit, expressly disagreeing with the Third Circuit in Sindia. (Slip op. at 9, App. 11).

Because of recent advances in the technology of underwater search and recovery, researchers are now able to find and salvage shipwrecks which previously were undetectable or beyond reach. See, e.g., Columbus-America Discovery Group, Inc. v. S.S. Central America, 742 F. Supp 1327 (E.D.Va. 1990). Therefore, it is an absolute certainty that other cases like the one at bar will arise in the foreseeable future. This makes it all the more important that this Court act now to clarify the question presented here, and resolve this fundamental and perplexing issue of federalism and admiralty jurisdiction.

II

Petitioners submit that the correct answer to the question presented is that reached by the District Court here: where there is no basis for a claim of title to the res by the intervening state - where the state has no "colorable claim" - the in rem action is not against the state and judgment against the state is not barred by the eleventh amendment. In reaching its conclusion that no showing of such a colorable claim is required, the Court of Appeals has delivered an opinion which is fatally flawed in both its reasoning and its result.

The Seventh Circuit begins its analysis by noting that "the eleventh amendment applies to admiralty in rem proceedings", citing In Re New York(I), 256 U.S. 490

(1921) and In Re New York(II), 256 U.S. 503 (1921). (Slip op. at 6, App. 7). Petitioners do not doubt that this statement is generally correct. The court then states the major premise of its opinion:

> A judgment declaring that the state possesses no interest in particular property is a judgment "against one of the United States" for Constitutional purposes. Cf. Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Land v. Dollar, 330 U.S. 731 (1947).

(Slip op. at 6, App. 7). Petitioners maintain that this statement is overbroad.[2]

The appellate court then turns to the central question of whether, to prevent adjudication of its claimed interest in particular property, the state must first show that there is some legal or factual basis for its assertion of the claim, i.e., whether the claim is colorable. The Court of Appeals notes that Treasure Salvors, relying on Edelman v. Jordan, 415 U.S. 651 (1974), held that because the State of Florida had no colorable claim to the disputed artifacts, an order directing State officials to deliver them to the marshal was not barred by the eleventh amendment. But the Seventh Circuit then

---

[2]Furthermore, the cases cited by the Court of Appeals in support of this proposition are inapposite. Neither Dugan, Larson nor Land involves either a state or the eleventh amendment. All three cases involve suits against the United States or federal officials.

distinguishes Treasure Salvors on the ground that, in that case, the action was directed against state officials, and holds that the strength, or colorability, of a state's claim is irrelevant when the state appears in its own name. "Then we know that the party is 'one of the United States' to which the eleventh amendment applies. . . . [I]t is the existence, and not the strength, of the claim that activates the eleventh amendment." (Slip op. at 7, App. 11).

But, having announced its holding, the Court of Appeals immediately backs away from it. To know whether a suit is against a state, the court says, "the court must determine whether the state has some interest." (Slip op. at 9, App. 10; emphasis in original).

> Michigan [for example] has no conceivable interest in the remains of the Lady Elgin so an all-claimants injunction could not be thought to invade Michigan's privileges in violation of the eleventh amendment. In this sense, some view of the merits [of the state's claim] is inevitable.

(Slip op. at 9, App. 10-11; emphasis added). Thus, the appellate court's holding is self-contradictory. On the one hand it says that the state need only assert a claim to invoke the eleventh amendment; on the other hand it says the court must examine the merits of that claim to determine whether there is any "conceivable" basis for it.[3]

---

[3]In requiring that the court examine the merits of the state's claim, and finding, as an example, that an unsupported claim by Michigan would not bar adjudication of the case, the Court of Appeals has, in effect,

But here, having found that it must "inevitably" "determine whether the state has some interest" in the Lady Elgin (Slip op. at 9, App. 10), the Court of Appeals refuses to do so. The court simply declares that "No one doubts that Illinois has a claim . . .". (Slip op. at 9, App. 11).

III

That declaration is completely erroneous. Petitioners have always denied that Illinois has any "conceivable" claim to the Lady Elgin, and the District Court held that the State failed to establish any such claim.

The appellate court's declaration, although it is not so stated, may be premised on the statutory authority upon which the court believes the State's claim to the Lady Elgin is based, i.e., the Submerged Lands Act, 43 U.S.C. § 1301 ("SLA") and the Abandoned Shipwreck Act, 43 U.S.C. § 2101 ("ASA"). (Slip op. at 4, App. 4). But the viability of the State's claims under the SLA and ASA depend on the Lady Elgin being an "abandoned" vessel,[4] which manifestly

---

adopted the analysis of the District Judge, who said, in discussing the eleventh amendment analysis in Maritime Underwater Surveys, supra, "Certainly the court [in Maritime] would not have held that the suit was one against the State of, say, Wyoming, were there no colorable basis for a claim by Wyoming, even if Wyoming appeared to assert title." 746 F. Supp. at 1341 n. 7. Whether the claiming state is Michigan, Wyoming or Illinois makes no difference; if "some view of the merits is inevitable" (Slip op. at 9), the court cannot avoid analyzing the state's claim to the property to determine if there is any basis for it. Here the appellate court failed to do what it said must be done.

[4]Illinois does not claim title directly under the SLA, and could not do so, as that Act does not convey to the states title to artifacts on submerged lands. See, Cobb Coin Co. v. Unidentified Vessel, 525 F. Supp. 186

it is not, a fact which the Court of Appeals here expressly recognizes: "Aetna Insurance Company paid $11,993.20 and became the owner of the wreck." (Slip op. at 3, App. 4; emphasis added). Therefore, neither of these Acts gives Illinois any "conceivable" or "colorable" claim to the Lady Elgin.[5]

It is beyond argument that the State of Illinois has no "conceivable" or colorable claim to the Lady Elgin. The undisputed fact is that the vessel is, and always has been, owned by private parties, namely CIGNA and the Lady Elgin Foundation. By asserting ownership of the wreck, but refusing to litigate the merits of its claim, the State of Illinois is simply hiding behind the eleventh amendment to prevent petitioners from gaining clear title to property which is

---

(S.D. Fla. 1981) at 214-216. Rather, the State claims ownership of the bottomland pursuant to the SLA, and of any artifacts "embedded" in the bottomland under an exception to the law of finds. But the embeddedness exception applies only to property which is "abandoned". Zych v. The "Seabird", 946 F.2d 525 (7th Cir. 1991); Klein v. Unidentified Vessel, 758 F.2d 1511 (11th Cir. 1985). The ASA, by its terms, applies only to "abandoned" shipwrecks. Furthermore, the Abandoned Shipwreck Act Guidelines promulgated pursuant to the Act by the National Park Service, 55 Fed. Reg. 50116 (Dec. 4, 1990), establish that the ASA vests title to the Lady Elgin in CIGNA, which passed its title to the petitioner Lady Elgin Foundation, Inc.: "When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed. Reg. at 50120. Such is the case here.

[5]The appellate court also alludes to the State's "belief" that it owns the Lady Elgin under "three state laws", (Slip op. at 4, App. 5), but neither cites these laws nor analyzes the merits of the State's "belief". The District Court here had determined that none of these State laws purports to grant Illinois title to wrecked vessels. 746 F.Supp. at 1342.

indisputably theirs. Without clear title, petitioners will be unable to proceed with recovery of the wreck. To paraphrase Justice Stevens in Treasure Salvors:

> If [a claim] by the State of [Illinois] were to authorize state officials to [deprive petitioners of] artifacts in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to [deprive owners] of property regardless of the [fact that the State has no legal interest in it] with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

458 U.S. at 697.

IV

This situation is exacerbated by the fact that, contrary to the conclusion of the Court of Appeals here, the "showdown between Zych and Illinois" will not - indeed, cannot - "occur in state rather than federal court". (Slip op. at 10, App. 11). There is no state forum available to petitioners to resolve this controversy. The Illinois sovereign immunity ("State Lawsuit Immunity") act, Ch. 127 ¶ 801, Ill. Rev. Stats., prohibits the State from being "made a defendant or party in

any court", except as provided in the Court of Claims act, Ch. 37 ¶ 439.8 Ill. Rev. Stats. And the Court of Claims act limits the subject matter jurisdiction of the Court of Claims so as to exclude a suit in the nature of an action to quiet title; nor does it appear the the Court of Claims has any in rem jurisdiction. (Because the State claims title to the Lady Elgin, rather than purporting to expropriate the Foundation's title, petitioners have concluded that a suit for damages for a fifth amendment taking would be unsuccessful. See, e.g., DSI Corp. v. United States, 655 F.2d 1072 (Ct.Cl. 1981)).

The effect of the Seventh Circuit's ruling in this case is to abrogate the exclusive admiralty jurisdiction of the federal court in salvage cases, see, Houseman v. Schooner North Carolina, 40 U.S. 40 (1841), and to leave petitioners without any forum in which to litigate their title to the res as against the State. This is manifestly an injustice, which this Court should put right by clarifying that, when the state can show no colorable claim to disputed property, the suit is not barred by the eleventh amendment.

CONCLUSION

So far as petitioners have been able to determine, this Petition is the first to squarely raise the issue left open in Treasure Salvors. It also implicates important questions of federalism and admiralty jurisdiction as to which much confusion and conflict of authority exists among the lower federal courts.

For the foregoing reasons, petitioners pray this Honorable Court to grant the writ of certiorari.

Respectfully submitted,

Paul N. Keller
Counsel of Record
505 Butler Place
Park Ridge, IL 60068

David J. Bederman
Of Counsel
Emory University
School of Law
Atlanta, GA 30322

Peter E. Hess
Attorney for Petitioner
300 E. Delaware Ave.
Wilmington, DE 19801

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 91-1673

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,
Plaintiff-Appellee,
v.
WRECKED VESSEL BELIEVED TO BE THE "LADY ELGIN"
Defendant,
and
THE LADY ELGIN FOUNDATION, INC.,
Claimant-Appellee,
and
UNITED STATES OF AMERICA,
Intervening Defendant,
and
ILLINOIS HISTORIC PRESERVATION AGENCY and
ILLINOIS DEPARTMENT OF TRANSPORTATION,
Intervening Defendant-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 6501--Ilana D. Rovner, Judge.

Decided April 3, 1992

Before CUMMINGS, EASTERBROOK, and MANION, Circuit Judges.

EASTERBROOK, Circuit Judge. Harry Zych, a diver, has been searching for wrecks in Lake Michigan. Recently he located two sidewheel steamers: the Seabird, which went down in 1868, and the Lady Elgin, which met its end in 1860. Zych commenced in rem salvage actions under the law of admiralty. Our case presents a question reserved in Zych v. The Seabird, 941 F.2d 525, 534 & nn. 15, 16 (7th Cir. 1991): Whether the eleventh amendment prevents the district court from declaring that a finder has rights superior to those of a state claiming an interest in a wreck.

I

One of the largest vessels at the time on the Great Lakes, the 300-foot, 1000-ton Lady Elgin (Figure 1) was built in Buffalo in 1851. In 1860 the Lady Elgin, under the command of Captain John Wilson, carried passengers, mail, livestock, and freight between Chicago and Bayfield, Wisconsin, and points along the way. One hundred members of the Union Guards in Milwaukee's Irish, Democratic, "Bloody Third" Ward hired the Lady Elgin for passage the evening of September 6, 1860, taking their wives, children, and friends to Chicago for the rally the next day for Stephen Douglas, running for President against Abraham Lincoln. See William Ratigan, Great Lakes Shipwrecks and Survivals 43-49 (1977 rev); Dwight F. Clark, The Wreck of the Lady Elgin, J. Ill. St. Historical Soc. 407-18 (Dec. 1946); A.T. Andreas Co., 2 History of Chicago 74-76 (1885).

After the rally a German band and 50 extra passengers joined the Irish Democrats and crew for the return voyage. While the band played and the merrymakers danced, a thunderstorm came up. About 2:00 a.m., while the Lady Elgin was running with full lights off Waukegan, the 350-ton schooner Augusta (Figure 2) rammed her amidships without warning. Although the unlighted Augusta had the Lady Elgin in her sights for some 20 minutes, she made no effort to change course until shortly before the collision. After disengaging, the Augusta resumed course for Chicago. Within 30 minutes the Lady Elgin broke up and sank about 10 miles off shore. Three life boats got off, and almost 300 persons clung to the hurricane deck of the Lady Elgin, which the force of the waves tore away from the ship.

Only 96 of the 393 souls on board the Lady Elgin survived, more than 100 dying within yards of shore at dawn as the surf shattered their supports and an undertow pulled them back into the lake. Captain Wilson and 25 passengers on one of the five segments remaining from the hurricane deck arrived at a sand bar under the 40-foot bluffs at Winnetka. The captain drowned trying to rescue a woman washed away from the platform. He received a hero's burial. Captain D.M. Malott of the Augusta, by contrast, was condemned for negligent sailing and leaving another vessel in distress. So strong was public sentiment that in May 1861 the Augusta (renamed the Colonel Cook in an unsuccessful attempt at disguise) abandoned her cargo in Milwaukee to avoid being burned by a mob and fled the Great Lakes. A few years later Malott and the crew of the Augusta met their fate on the bark Major, which vanished with all hands in Lake Michigan.

This second-greatest tragedy in the history of the Great

Lakes was celebrated in song and story. Henry C. Work, who wrote the song "Lost on the Lady Elgin," went on to greater fame with his "Marching Through Georgia." So many Irish political activists died on September 8, 1860, that the disaster has been credited with transferring the balance of political power in Milwaukee from the Irish to the Germans. Aetna Insurance Company paid $11,993.20 and became the owner of the wreck. Aetna had written policies of $5,000 on the hull and $2,500 on the cargo. (Its files do not reveal why it paid more.) The insurer instructed its agents not to abandon the Lady Elgin, but nothing other than flotsam was found for 129 years, until Zych located the wreck in deep water.

Zych sought a judgment confirming his title "against all claimants and all the world." In case that were not comprehensive enough, he demanded that "all governments, governmental agencies, [and] states" be required to show cause why he should not "be put into full possession and [his] title confirmed." The only two governments with a potential interest in the vessel are the United States and Illinois. Both intervened, the state through two agencies that serve as its alter egos and to which we refer, collectively, as "Illinois." The wreck lies under the navigable waters of the United States within Illinois, and thus on "lands beneath navigable waters" for purposes of the Submerged Lands Act, 43 U.S.C. § 1301(a)(1). Whatever interest the United States has in the debris, it surrendered to Illinois via § 3 of the Submerged Landsct, 43 U.S.C. § 1311, and the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-06. After first asserting title to all abandoned shipwrecks "embedded in submerged lands of a State", § 2105(a)(1), Congress transferred ownership "to the State in or on whose submerged lands the shipwreck is located", § 2105(c). Illinois believes that it owns the Lady

Elgin under this statute as well as three state laws.

After intervening, Illinois asked the district court to dismiss Zych's action, or at a minimum exclude the state from the scope of any judgment, on the ground that the eleventh amendment prevents the court from adjudicating any dispute between Zych and Illinois. (We use "eleventh amendment" as shorthand for the Constitution in conjunction with the principles of sovereign immunity that the Supreme Court applies to suits against states.) Zych challenged both the application and the constitutionality of the state and federal laws, but the district court granted the state's motion in part. 746 F. Supp. 1334 (N.D. Ill. 1990). Relying on Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), the court concluded that once a state demonstrates a "colorable claim" to the wreck, the eleventh amendment insulates it from adjudication of adverse claims. Although the court dismissed the suit to the extent Zych sought relief against Illinois, it concluded that the eleventh amendment does not bar an adjudication of Zych's rights vis-a-vis other persons.

Zych had a problem: To show entitlement to salvage or ownership under the law of finds, he needed to show that the Lady Elgin is an abandoned wreck. If it is, then Zych prevails over all other private claimants but the state may take the prize. If the Lady Elgin is an abandoned wreck, then the eleventh amendment may prevent litigation against Illinois in federal court, and if he moves to state court Illinois has a powerful claim on the merits, subject to the requirement that it show that the wreck is "embedded", see § 2105(a)(1) and The Seabird, 941 F.2d at 529-30. If, however, the wreck is not abandoned, then other private persons may have claims

superior to Zych's. To hedge his bets, Zych decided to acquire any existing private interests in the Lady Elgin. He and some friends formed the Lady Elgin Foundation, Inc., to approach CIGNA, Aetna's successor. The Foundation purchased CIGNA's rights in the vessel in exchange for 20% of the gross proceeds of the sale of any items recovered from the wreckage. Intervening, the Foundation asserted a claim superior to Zych's.

Once the district court dismissed Zych's claims against Illinois, there followed litigation between Zych and the Foundation having at most the trappings of adversariness. Zych contended that the Lady Elgin is an abandoned shipwreck, and the Foundation contended that it is not. The district court ruled for the Foundation, concluding that Aetna, which instructed its agents not to abandon the Lady Elgin, never intentionally surrendered its interest as subrogee of the vessel's owner. 755 F. Supp. 213 (1991); 1990 U.S. Dist. LEXIS 16760.

This turn of events disturbed Illinois, whose strongest claim depends on the Lady Elgin's being an "abandoned" vessel. Nonetheless, it refused to participate in the "contest" between Zych and the Foundation, standing on its view that the eleventh amendment precludes the entry of a judgment adverse to a state and that at all events it had been dismissed from the proceedings. According to the district judge, Illinois' standoffishness waived all right to be heard on the merits of the question whether the Lady Elgin is indeed abandoned. 755 F. Supp. at 217. Given its conclusion that the Foundation owns the wreck, the court held that the eleventh amendment no longer barred a judgment in Zych's favor. Zych signed a salvage contract with the Foundation,

promising to turn over half of all he retrieved. As holder of salvage rights granted by the owner of the Lady Elgin, Zych applied for an injunction barring all potential rivals, including Illinois, from interfering with his efforts to raise artifacts from the wreckage. The district court issued the requested injunction, 1991 U.S. Dist. LEXIS 2962, from which Illinois appeals.

II

Illinois urges three objections to the district court's conclusion: First, the state contends that having concluded that the state's claim is colorable so that the state was at no risk, the court could not adjudicate the merits in its absence and use the result as the basis of an injunction. Second, Illinois insists that its claim is not only colorable but also correct. Third, Illinois maintains that the strength of a state's legal arguments has nothing to do with its immunity under the eleventh amendment. Because the eleventh amendment limits the jurisdiction of the federal courts, we start with this third argument.

The eleventh amendment applies to admiralty in rem proceedings. In re New York (I), 256 U.S. 490 (1921); In re New York (II), 256 U.S. 503 (1921). A judgment declaring that the state possesses no interest in particular property is a judgment "against one of the United States" for constitutional purposes. Cf. Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Land v. Dollar, 330 U.S. 731 (1947).

According to Zych, everything changed with Edelman v. Jordan, 415 U.S. 651 (1974), which Zych presents as holding

that prospective relief never violates the eleventh amendment. A declaration of rights in the wreck governs future conduct exclusively and therefore does not transgress the eleventh amendment. Zych misunderstands Edelman, which reaches no such sweeping conclusion. See Green v. Mansour, 474 U.S. 64 (1985). Edelman discussed the scope of Ex parte Young, 209 U.S. 123 (1908), which permits relief against public officials under circumstances establishing that the officials are not "the state". Edelman holds that courts may command public officials to obey the Constitution and federal statutes as they carry out their duties in the future but may not direct them to invade the state treasury to made good for past misdeeds. Such relief, which would effectively bind the state, is forbidden even if nominally against private persons. Edelman and Young are irrelevant when the state appears in its own name. Then we know that the party is "one of the United States" to which the eleventh amendment applies. Cory v. White, 457 U.S. 85, 90-91 (1982); Alabama v. Pugh, 438 U.S. 781 (1978); Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991). The Illinois Historic Preservation Agency and the Illinois Department of Transportation, the two intervening agencies, are the State of Illinois for constitutional purposes. Will v. Michigan Department of State Police, 491 U.S. 58 (1989); Kentucky v. Graham, 473 U.S. 159 (1985); Kaimowitz v. Board of Trustees, 951 F.2d 765, 767-68 (7th Cir. 1991). It is therefore no surprise that the Supreme Court recently declared, without citing Edelman, that there is no general in rem exception to principles of sovereign immunity. United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1017 (1992).

The district judge located her "colorable claim" requirement not in Edelman but in Treasure Salvors. Yet

Treasure Salvors is nothing but an application of Edelman. A diver located the Nuestra Senora de Atocha, a 17th century Spanish galleon, in water more than three miles from Florida's coast. After the court of appeals held, in litigation between the finder and the United States, that the wreck lay in international waters, Treasure Salvors, Inc. v. The Atocha, 569 F.2d 330 (5th Cir. 1978), the district court issued process to arrest some of the galleon's artifacts in Florida's possession. The warrant directed the marshal to seize the artifacts from two named public officials; the state itself intervened. Whether the warrant could be executed presented the usual question under Young: were these two natural persons to be treated as "one of the United States"? Four justices said no, 458 U.S. at 693-99 (Stevens, J., joined by Burger, C.J., and Marshall & Blackmun, JJ.); four said yes, id. at 702-17 (White, J., joined by Powell, Rehnquist & O'Connor, JJ.); one denied that the answer mattered, id. at 700-02 (Brennan, J., adhering to his view that Hans v. Louisiana, 134 U.S. 1 (1890), was wrongly decided, and that neither the eleventh amendment nor principles of sovereign immunity curtails the jurisdiction of the federal courts when the plaintiff is a citizen of the defendant state).

The four justices who thought that Edelman and Young authorized the warrant stressed that Florida had not commanded the two officials to maintain possession of the artifacts, which came into the state's possession under a contract with the salvor--a contract that by its terms expired when the court of appeals held that the Atocha lay outside the state's waters. Justice Stevens observed that "the State does not have even a colorable claim to the artifacts" under its contract, 458 U.S. at 694, and that no statute "has been advanced that even arguably would authorize officials of the

Division of Archives to retain the property at issue", id. at 696, in the absence of a contract. Because Florida had not commanded the officials to retain the artifacts these four justices believed, the warrant was not equivalent to an order overriding the state's decision. These four justices went on to hold, however, that the district judge erred in adjudicating the rights of the state itself. Id. at 699-700. The four justices who thought Edelman and Young insufficient to authorize the warrant necessarily concluded that the court could not resolve the claims of the state. So eight justices were of opinion that a district court may not, in an admiralty in rem action, decide whether a state owns a wreck and its artifacts.

Treasure Salvors did not overrule New York (I) and New York (II), which preclude an injunction of the kind the district court issued. Although Treasure Salvors shows that some members of the Court believe that it is appropriate to grant relief affecting public officials who hold salvaged artifacts under feeble legal claims, it creates no opening for relief against a state in its own name. The strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction. Accord, Maritime Underwater Surveys, Inc. v. Abandoned Sailing Vessel (The Whidah), 717 F.2d 6, 8 (1st Cir.1983); Fitzgerald v. Abandoned Vessel (HMS Defiance), 866 F.2d 16, 18 (1st Cir. 1989).

To know whether a general all-the-world injunction runs against a state, the court must determine whether the state has some interest. Michigan has no conceivable interest in the remains of the Lady Elgin, so an all-claimants injunction could not be thought to invade Michigan's privileges in violation of the eleventh amendment. In this sense, some view

of the merits is inevitable. Marx v. Guam, 866 F.2d 294, 299-300 (9th Cir. 1989), on which Zych relies, establishes no more than this. We hold that it is the existence, and not the strength, of the claim that activates the eleventh amendment. No one doubts that Illinois has a claim, which is the principal target of the district judge's injunction. To the extent Sindia Expedition, Inc. v. The Sindia, 895 F.2d 116, 119-20 (3d Cir. 1990), holds that an in rem action is never against the state, the court misunderstands Treasure Salvors, and we respectfully disagree with its holding.

III

One final subject detains us only briefly. Illinois contends that the state is an indispensable party under Fed. R. Civ. P. 19(b). If it is, the district court must dismiss the entire case. The first circuit agrees with this position, see The Whidah, 717 F.2d at 8; HMS Defiance, 866 F.2d at 18-19. The third circuit does not, see The Sindia, 895 F.2d at 121-23. The Seabird settles the question for our circuit, pointing out, 941 F.2d at 534 n.16, that Treasure Salvors itself allowed a court to issue a decree without the presence of the state as a formal party. The district court accordingly may determine the rights of Zych versus the world with the exception of Illinois. The showdown between Zych and Illinois will occur in state rather than federal court.

VACATED AND REMANDED

[SEE Figure 1 IN ORIGINAL]

[SEE Figure 2 IN ORIGINAL]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Harry ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,
Plaintiff,

v.

The UNIDENTIFIED, WRECKED AND ABANDONED VESSEL, BELIEVED TO BE THE SB "LADY ELGIN",
Defendant,

No. 89 C 6501

1991 U.S. Dist. LEXIS 2962

March 11, 1991

Ilana Diamond Rovner, United States District Judge.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On December 11, 1990, the Court entered final judgment in favor of the Lady Elgin Foundation (the "Foundation") and against plaintiff Harry Zych ("Zych"), declaring that the Foundation is the sole owner of the shipwrecked Lady Elgin and dismissing plaintiff's complaint. See Zych v. Lady Elgin, 1990 U.S. Dist. LEXIS 16760 (N.D. Ill. Dec. 11, 1990). Pursuant to a motion by plaintiff to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), the Court

subsequently modified its December 11, 1990 ruling in order to retain jurisdiction over plaintiff's claim for salvage. See Zych v. Lady Elgin, 1991 U.S. Dist. LEXIS 86 (N.D. Ill. Jan. 4, 1991). At the same time, the Court denied a motion by the Illinois Department of Transportation and the Illinois Historic Preservation Society (collectively, the "State") to vacate or to alter or amend the judgment. The State had contended that the Court's December 11, 1990 opinion had improperly adjudicated its interest in the Lady Elgin in contravention of the Eleventh Amendment. In its January 4, 1991 opinion, the Court reaffirmed its earlier conclusion that the State had waived any such objections to the Court's ruling.

On January 24, 1991, plaintiff filed the instant motion for a preliminary and permanent injunction, requesting that the Court enter an injunction prohibiting the interference by any person with Zych's exclusive salvage rights in the Lady Elgin. Attached as an exhibit to plaintiff's motion was a "Salvage Contract," dated January 23, 1991, between plaintiff and the Foundation. The Salvage Contract presumably settles by agreement of the parties to the contract plaintiff's claim for salvage. Pursuant to the Salvage Contract, Zych possesses the exclusive right of salvage to the subject vessel, and the Foundation shall pay to Zych "fifty per cent (50%) of the value of the property recovered, including all property recovered to date." (Salvage Contract, at paras. 4 & 5.)

In addition to this Salvage Contract, plaintiff also submitted an affidavit along with his motion explaining why an injunction is necessary to protect his exclusive salvage operation. Zych attests that he has received reports that "various unauthorized persons" have been diving on the

wreck and that they have been removing artifacts from the site. (Zych Aff., at para. 2.) He also states that, during his own dives to the wreck site, he has observed that certain artifacts on the site have been rearranged. (Id. at para. 3.) Plaintiff states that an order from this Court enjoining such unauthorized interference with his exclusive salvage operation would enable him "to call upon the Coast Guard and other enforcement agencies for assistance in detecting and apprehending unauthorized salvors." (Id. at para. 10.)

On January 11, 1991, prior to plaintiff's filing of the present motion for injunctive relief, the State filed a notice of appeal in which it appealed from this Court's January 4, 1991 order and all other orders entered in this case prior to January 4, 1991. For the reasons set forth below, the Court concludes that the State's appeal does not deprive the Court of jurisdiction to consider plaintiff's motion. Moreover, the Court will grant plaintiff's motion in part and will issue a preliminary injunction to remain in effect during the pendency of the State's appeal. The injunction will protect the rights accorded plaintiff by this Court's prior orders and by his Salvage Contract with the Foundation and will prohibit the unauthorized interference by any person with plaintiff's exclusive salvage rights in the Lady Elgin.

II. DISCUSSION

A. The Court's Jurisdiction.

A threshold issue posed by the present motion concerns the Court's jurisdiction to issue the requested injunction in light of the State's appeal. Generally, the filing of a notice of appeal by any party to the proceedings before the district

court "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 402 (1982). Plaintiff advances three reasons why the State's appeal does not deprive this Court of jurisdiction to issue the requested injunctive relief: (1) Fed. R. App. P. 8 authorizes injunctive relief pending an appeal; 2) the issues posed by plaintiff's motion for an injunction are separate from those involved in the State's appeal; and (3) the State's appeal was improvidently taken. (See Zych Motion, at 3.) The Court finds that it has jurisdiction pursuant to the second of the three arguments advanced by plaintiff. As a result, the Court does not address plaintiff's two other arguments.

In its opinion of January 4, 1991, the Court amended its December 11, 1990 opinion in order to retain jurisdiction over plaintiff's claim of salvage. The Court earlier had dismissed that claim because it believed that the Foundation already had reached an agreement with plaintiff as to salvage, rendering the salvage claim moot. When informed by the parties that the prior salvage agreement had been rescinded, the Court concluded that the salvage claim was not moot and therefore retained jurisdiction over that claim. Zych, 1991 U.S. Dist. LEXIS 86, slip op. at 2. Plaintiff's claim of salvage clearly is not involved in the State's appeal. Rather, that appeal involves the Court's determinations regarding whether the State has a colorable claim of ownership in the vessel and whether the State expressly waived any arguments

in opposition to the Court's findings regarding ownership.[1]

Clearly, this Court retains jurisdiction to enforce its prior orders and to rule on matters unresolved in those orders. See United States v. Board of School Commissioners, 503 F.2d 68, 81-82 (7th Cir. 1974), cert. denied, 421 U.S. 929, 95 S.Ct. 1654 (1975); Plaquemines Parish Commission Council v. United States, 436 F.2d 952, 954 (5th Cir. 1969); Evans v. Buchanan, 455 F.Supp. 692, 695 (D. Del. 1978). The present motion asks that the Court do both, and therefore the motion falls outside the general rule that an appeal divests the district court of its jurisdiction. Plaintiff has requested injunctive relief to protect the exclusive right to salvage granted him by the Foundation, the party which this Court found in its December 11 opinion to be the owner of the vessel. An injunction serves to protect and enforce this Court's previous order regarding ownership. Moreover, as stated above, the Court expressly retained jurisdiction over plaintiff's claim of salvage in its January 4 opinion. The issue of plaintiff's salvage claim, and whether this Court should protect the salvage operation through its injunctive powers, were left unresolved in the Court's prior opinion. Those issues are not involved in the State's appeal. Accordingly, even after the filing of that appeal, the Court retains jurisdiction to grant the requestd relief.

---

[1]Significantly, the State has not requested from this Court a stay or an injunction of the enforcement of its prior orders during the pendency of its appeal. Thus, the Foundation and its designated salvor remain free to commence their salvage operation despite the State's appeal.

B. The Motion for Injunctive Relief.

On the merits of his motion, plaintiff claims that he is entitled to an injunction to protect his exclusive salvage operation from the interference of unauthorized salvors. Plaintiff does not ask the Court to issue this injunction against any particular person or salvor -- presumably, plaintiff is unaware of the identity of those persons who allegedly have disturbed the wreck -- but instead asks that the injunction be issued against any potential interferer. Thus, the requested relief would apply to any person who threatens to interfere with Zych's exclusive salvage operation.

In support of this extraordinary relief, plaintiff cites United States v. Crookshanks, 441 F.Supp. 268 (D. Or. 1977), a case involving Native American fishing rights in the Columbia River. There, a federal district court had issued a temporary restraining order which prohibited certain persons from utilizing gillnets in fishing for chinook salmon for commercial purposes in a designated portion of the river. In issuing the TRO, the court had found that such activity would interfere with the fishing rights granted to Native American fishermen by a series of treaties between the Native Americans and the United States. Id. at 269. The defendants in Crookshanks were then prosecuted for criminal contempt for allegedly violating the TRO. In defense, they claimed that the TRO was unenforceable as against them because they had not been parties to the underlying litigation in which the TRO had been entered. The district court which heard the contempt case[2] upheld the enforcement of the TRO as against the

[2]The district court judge who heard the contempt case was a different judge than the one who had entered the TRO. Id. at 269

defendants, holding that "there is authority to the effect that a court can enjoin non-parties whose actions threaten to interfere with compliance with prior orders of the court." Id. at 270 (citing Cooner v. Aaron, 358 U.S. 1, 78 S. Ct. 1401 (1958) and United States v. Hall, 472 F.2d 261 (5th Cir. 1972)). Moreover, the court likened the TRO to an in rem injunction through which the court takes control over the property at issue to ensure its proper use. As an example, the court cited the bankruptcy jurisdiction of the federal courts, through which the bankrupt's estate is controlled by the court and the rights of non-party creditors are thereby restricted. Crookshanks, 441 F.Supp. at 270.[3]

The Court agrees that Crookshanks provides sound authority for the injunction requested in this case. In Crookshanks, another district court already had determined the legitimacy of Native American fishing rights in the affected area; similarly here, this Court already has determined that the Foundation owns the Lady Elgin. In accordance with its ownership rights, the Foundation granted an exclusive right to salvage the vessel to plaintiff Zych. Thus, as a result of the prior orders of this Court and the contractual relationship between plaintiff and the Foundation,

---

[3]The district court in Crookshanks also noted that defendants were in privity with the State of Washington, a party to the earlier action. Id. The court determined that the state had adequately represented the interests of its citizens in the earlier action so as to bind them to the provisions of the TRO. Zych analogizes this to the present case, arguing that "all citizens of Illinois are in privity with the State and are bound by this Court's order finding that the State has no claim to the vessel." (Zych Motion, at 5.) Because the Court finds independent bases for issuing the requested injunction, it expresses no opinion on the effect of the State's involvement in this case on the citizens of Illinois.

plaintiff possesses the exclusive right to salvage the vessel. A concomitant benefit of that right is "the right to exclude others from participating in the salvage operations." Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981). In the unique circumstances presented in this case, plaintiff is entitled to seek the aid of this Court in protecting himself and his salvage operation from the threatened interference of competing salvors. The denial of such relief would render the Foundation's victory on the abandonment issue a hollow one indeed.

Moreover, because of the in rem nature of this action, the Court has the power to restrict access to the res -- the shipwreck itself. As in Crookshanks, where the court had the power to protect the Native Americans' property right, which consisted of the opportunity to take fish in an area of the Columbia River reserved to them by treaties, this Court may protect Zych's right to salvage the Lady Elgin, a property right conferred by the Salvage Contract and the prior rulings of the Court. In order to protect this property right from unauthorized interference, the Court "can properly command the obedience of non-parties" to its orders. Crookshanks, 441 F.Supp. at 270.

Although the Court finds that it has the power to issue an injunction against unidentified non-parties who may interfere with plaintiff's salvage operation, to be entitled to such relief, plaintiff still must satisfy each of the four requisites for a grant of preliminary injunctive relief. In this Circuit, plaintiff must establish:

(1) a reasonable likelihood of success on the merits;

> (2) irreparable injury and absence of an adequate remedy at law; (3) the threatened harm to the plaintiff outweighs the harm injunction may cause to the defendants; (4) that the granting of the injunction will not disserve the public interest.

Cox v. City of Chicago, 868 F.2d 217, 219 (7th Cir. 1989); see also Kellas v. Lane, 1990 U.S. App. LEXIS 18422, slip op. at 3 (7th Cir. Jan. 22, 1991); Schwinn Bicycle Co. v. Ross Bicycles, Inc., 870 F.2d 1176, 1181 (7th Cir. 1989). The Court is satisfied that plaintiff has carried its burden of establishing each of these prerequisites.

1. Likelihood of Success on the Merits.

During the pendency of the State's appeal, there clearly is a likelihood that plaintiff would succeed on the merits of its claim against any competing salvor.[4] This Court has found that the Foundation is the owner of the Lady Elgin. Pursuant to the Salvage Contract, the Foundation then conferred on plaintiff the exclusive right to salvage the vessel. Thus, it is likely that plaintiff would prevail on the merits of any claim

---

[4]This likelihood of success, however, could be affected by the Court of Appeals' resolution of the State's appeal. Thus, the Court will limit the duration of the injunction to the pendency of the appeal. At the hearing on plaintiff's motion, counsel for the Foundation, with the apparent acquiescence of plaintiff's counsel, stated that only a preliminary injunction pending the appeal was now required. Depending on the outcome of that appeal, the preliminary injunction could later be converted to permanent relief. (See Tr. of Hearing, February 2 1991.) The Court agrees that this is the proper procedure in these circumstances.

to enforce his salvage rights against any competing salvor.

2. Irreparable Harm.

Plaintiff's affidavit establishes that he lacks an adequate remedy at law and that he would suffer irreparable harm in the absence of injunctive relief. Plaintiff states that he has received reports "that various unauthorized persons were diving on the wreck and removing artifacts therefrom." (Zych Aff., at para. 2.) Moreover, based upon his own observation, plaintiff "believes that the site has been disturbed by other divers." (Id. at para. 3.) In the unusual circumstances of this case, these statements are sufficient evidence that the threat of unauthorized interference with plaintiff's salvage operation is real. The Court finds that absent an injunction, plaintiff would be irreparably harmed during the pendency of the State's appeal. Cf. Treasure Salvors, 640 F.2d at 570.

3. Balance of Harms.

The Court further finds that plaintiff has adequately demonstrated that the harm threatened to him would outweigh the harm a preliminary injunction would cause any other person affected by the injunction. No other person has an ownership interest in or right to salvage the Lady Elgin. Thus, competing salvors could not be harmed by an injunction that prevents their interference with Zych's salvage operation.[5]

---

[5]The Court, however, is concerned that Zych not interpret the preliminary injunctive relief as providing broad authority to exclude other persons from a vast area of Lake Michigan. Paragraph four of plaintiff's affidavit is the source of the Court's concern; in that paragraph, Zych

4. Public Interest.

Finally, a preliminary injunction would not disserve the public interest. The public's interest lies in the protection of the historically significant artifacts immersed in the waters of Lake Michigan. Interference by unauthorized salvors, which would disrupt Zych's authorized salvage operation, would subvert the public interest in maintaining historically significant items to the greed of individual salvors. Moreover, it is in the public interest that the previous orders of this Court, and the Salvage Contract between Zych and the Foundation, be enforced. The public interest clearly favors the issuance of injunctive relief.

III. CONCLUSION

For the reasons set forth above, the Court finds that it has jurisdiction to consider plaintiff's motion for injunctive relief and that each of the prerequisites to a grant of preliminary injunctive relief has been satisfied. Accordingly, the Court grants plaintiff's motion in part and will enter separately and

---

states that "the wreckage and artifacts of the Lady Elgin are scattered over a large area of the Lake bottom, several miles long, and several miles from shore." (Zych Aff., at para. 4 (Court's emphasis).) The Court's injunction only prohibits interference with the salvage of the Lady Elgin. It does not prohibit any vessel or diver from operating in the vicinity of the wreck. The measures adopted by Zych to protect his salvage operation from unauthorized interference pursuant to the Court's injunction should be carefully tailored so as not to indiscriminately exclude others from areas of Lake Michigan that are unaffected by the salvage operation. Only by so limiting the area affected by the injunction will the likelihood of harm to others be minimized.

contemporaneously herewith a Preliminary Injunction. This preliminary injunction will remain in effect during the pendency of the State's appeal. If the Court of Appeals should dismiss the State's appeal or affirm the prior orders of this Court, then the Court would entertain a motion to convert the instant injunction to permanent status.

PRELIMINARY INJUNCTION

For the reasons set forth in the Court's Memorandum Opinion and Order of March 11, 1991, it is hereby ordered that all persons other than plaintiff Harry Zych, and those persons expressly authorized by him, be restrained from conducting any salvage operation of the abandoned vessel believed to be the Lady Elgin, or from interfering in any way with the exclusive right of plaintiff to conduct such salvage operation. This preliminary injunction shall remain in effect during the pendency of the appeal taken in this case by the Illinois Historic Preservation Agency, the Illinois Department of Transportation, and the State of Illinois and shall terminate on the date that the mandate in that appeal issues from the Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Harry ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,
Plaintiff,

v.

The unidentified, wrecked and abandoned vessel,
believed to be the SB "LADY ELGIN",
Defendant

No. 89 C 6501

755 F. Supp. 213;
1991 U.S. Dist. LEXIS 86; 1991 AMC 1261

January 4, 1991

Ilana Diamond Rovner, United States District Judge

I. INTRODUCTION

This admiralty action commenced on August 28, 1989, when plaintiff Harry Zych, doing business as American Diving and Salvage Co., filed an in rem complaint against a shipwreck located in Lake Michigan and believed to be the "Lady Elgin." The complaint asserted that the ship was abandoned and that he was the rightful owner pursuant to the law of finds. The Court issued a warrant for arrest of the vessel on August 28.

Subsequently, the Illinois Department of Transportation and the Illinois Historic Preservation Society (collectively, "the State") moved to intervene for the limited purpose of moving to dismiss on the basis of the State's immunity pursuant to the Eleventh Amendment of the U.S. Constitution. During the briefing of that motion, Zych and others formed the Lady Elgin Foundation ("the Foundation"). The Foundation intervened on May 3, 1990, asserting that it had become the owner of the shipwreck pursuant to an agreement with CIGNA Property & Casualty Insurance Co., which had originally insured the vessel and her cargo. The Foundation also sought leave to file its claim and an answer to the complaint.

On September 13, 1990, the Court granted the State's motion to dismiss on the ground of immunity. Zych v. Lady Elgin, 746 F. Supp. 1334 (N.D. Ill. 1990). Because there remained an apparent dispute between Zych and the Foundation over ownership of the vessel, the Court did not dismiss the case in its entirety. However, the Court expressed concerns as to whether there was a case or controversy, and it directed Zych and the Foundation (both of whom were represented by the same attorney) to file reports showing why the case should not be dismissed in its entirety. 746 F. Supp. at 1351 n. 16.

After receiving the parties' submissions, the Court granted the Foundation leave to file its claim and answer on the condition that it retain independent counsel and that plaintiff pursue his adverse claim of title. The Court also set a briefing schedule for dispositive motions. The parties have filed memoranda concerning the merits of the Foundation's

claim, and that issue is now pending.

II. OWNERSHIP

The Foundation asserts that the Aetna Insurance Co. became the owner of the shipwreck when, in 1860, it paid out $11,993.20 on the loss pursuant to an insurance contract covering the vessel and her cargo. In April of 1990, the Foundation executed an agreement with CIGNA, the successor of Aetna. Pursuant to that agreement, CIGNA transferred its ownership interest in the shipwreck to the Foundation in exchange for twenty percent of the gross proceeds of the sale of any property or artifacts from the shipwreck. Accordingly, the Foundation contends that it now has title to the wreck.

Zych asserts title pursuant to the law of finds. The law of finds awards title of abandoned property to the first finder who takes possession of the property with intent to exercise control over it. See generally Zych, 746 F. Supp. at 1343. Zych concedes the facts alleged by the Foundation but argues that CIGNA abandoned the vessel. The sole dispute between Zych and the Foundation is whether the vessel has been abandoned.

Abandonment is the voluntary relinquishment of one's rights in a property. Mucha v. King, 792 F.2d 602, 610 (7th Cir. 1986). It occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." Columbus-America Discovery Group, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 742 F. Supp. 1327, 1335 (E.D. Va. 1990), quoting 3A Benedict on Admiralty § 134 (7th ed.

1980). It must be voluntary, with a positive intent to part with ownership, and without coercion or pressure. Katsaris v. United States, 684 F.2d 758, 762 (11th Cir. 1982).

To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. Chemical Sales Co. v. Diamond Chemical Co., 766 F.2d 364, 368 (8th Cir. 1985); Columbus-America, 742 F. Supp. at 1335; Hoelzer v. City of Stamford, 722 F. Supp. 1106, 1111 (S.D.N.Y. 1989); State of Idaho v. Oregon Short Line Railroad Co., 617 F. Supp. 213, 217 (D. Idaho 1985). Abandonment may be inferred from all of the relevant facts and circumstances. United States v. Sylvester, 848 F.2d 520, 525 (5th Cir. 1988); Katsaris, 684 F.2d at 762; Columbus-America, 742 F. Supp. at 1335. A finding of abandonment must be supported by strong and convincing evidence, Chemical Sales, 766 F.2d at 368, but it may, and often must, be determined on the basis of circumstantial evidence. Katsaris, 684 F.2d at 762; Columbus-America, 742 F. Supp. at 1343.

The Foundation has submitted a number of documents and affidavits in support of its claim. The Foundation relies heavily on the affidavit of Ivan Avery, an expert in insurance archival matters and an officer of a subsidiary of CIGNA. Avery reviewed a Letter Book containing correspondence from July 23, 1860, through March 5, 1861, and found six letters relating to the Lady Elgin wreck. He notes that the Letter Book would only have contained the most significant correspondence due to the difficulty and expense of copying documents at that time.

The first document is a letter dated September 11, 1860,

from Thomas Alexander, an officer of Aetna, to Gordon Hubbard and a Mr. Hunt. Hubbard was an agent of Aetna and also owned the Lady Elgin, and Hunt was his partner. In the letter, Alexander states that he has been informed of the loss and expresses hope that the company will escape claims on the cargo.

Also on September 11, 1860, Alexander wrote to Captain E.P. Door, the surviving captain of the Lady Elgin, inquiring as to ongoing litigation against the owners of the schooner Augusta, which had caused the Lady Elgin to sink by ramming her during a storm.

On September 13, 1860, Aetna President E.G. Ripley wrote to J.B. Bennett, an Aetna agent based in Cincinnati. He noted that the Aetna policies applicable to the Lady Elgin were for $5000 for the hull and $2500 for the cargo. Ripley wrote to Hubbard and Hunt on September 22, 1860, instructing them to pay on the Lady Elgin claims as soon as possible upon the receipt of invoices.

On October 10, 1860, Alexander wrote again to Hubbard and Hunt. After an apparent discussion of the interest on the claim, he writes, "permit us to confirm Capt. Dorr instructions not to accept an abandonment of the vessel, for the reason which he informs us he gave you on his recent visit to Chicago."

The final document is a letter from Alexander to Hubbard and Hunt on November 15, 1860, noting the payment of $11,993.20 to Hubbard "in full of policy on Lady Elgin."

The Foundation also submits the affidavit of Christopher

Parson, its Executive Director. Parson states that the Lady Elgin has been the subject of intensive search efforts by a number of prominent salvors and underwater explorers as well as many less organized efforts by sport divers. Parson also describes the search methods which were used in conducting both Zych's earlier, unsuccessful efforts to locate the wreck and those used in his recent, successful effort. Because of the location of the wreck, in very deep water and spread out among boulders and large stones in the lake bed, the wreck could not have been found without the state-of-the-art technology which Zych used to discover the wreck and which was not available until the late 1980's.

Zych does not dispute the facts asserted by the Foundation based on this evidence. In fact, the parties have stipulated that the documents show that Aetna insured the Lady Elgin's hull and cargo, that Aetna received claims and supporting documentation for the loss, that Aetna paid the claims in full for $11,993.20, and that Aetna instructed its agents not to abandon the Lady Elgin. Zych also concedes that Aetna acquired title to the Lady Elgin by subrogation. However, Zych disputes the legal significance of these facts. He argues that Aetna abandoned the wreck through the lapse of time and the failure to take any steps to recover the vessel. See Wiggins v. 1100 Tons of Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960) (although lapse of time and "nonuser" are not sufficient in themselves to constitute abandonment, they did imply an intent to abandon when considered along with the failure to conduct sufficient efforts to recover the property).

The only reported case which the Court and the parties have been able to locate in which an insurer has asserted title

to a shipwreck is Columbus-America. In that case, the court determined that the insurance companies had abandoned a vessel which was wrecked in 1857. The insurers had submitted, as proof of ownership, newspaper articles from the time of the wreck which indicated that the insurers stated they would pay the claims upon presentation of proper proof. 742 F. Supp. at 1344. The court assumed that payments had actually been made in accord with this intent. Id. However, the court emphasized that it had not been provided with the types of documents it would expect were involved in the transactions, such as an invoice, a bill of lading, a draft or bill of exchange evidencing the payment itself, and an insurance certificate. Id. The court then stated:

> The insurance carriers destroyed their records relating to the events of the Central America. Exactly when is not shown, but evidence establishes it was their custom to keep records for some five year periods, and thereafter destroy them. However, one expert on marine insurance testified that if a company intended to assert its right to subrogation, it always maintained its documents of proof of the claim and that it had paid the claim, and the fact it disposed of such documents was an indication it abandoned its claim. It is difficult to believe that a company claiming an asset or property worth $150,000.00 in the 1800's or even early 1900's would destroy all evidence of its claim if it had any intention to pursue it, or any hope of recovery. How could one better demonstrate their intention to abandon a claim to or interest in property than to intentionally destroy every evidence of its claim, right or title thereto. . . . Their actions speak

> clearly. They had no hope or idea they could locate the Central America, and even if they located it, they had no hope they could recover anything from it. They destroyed the documents and intended thereby to abandon any claim they might have.

Id. at 1344-45. The court also emphasized that the insurers had not joined or assisted in any of several well-publicized expeditions after the technology capable of locating the wreck became available. Id. at 1345.

This case, of course, differs from Columbus-America in that there is no affirmative act, such as the destruction of documents, which indicates an intent by Aetna to abandon the wreck. Indeed, one of the documents appears to show a specific intent not to abandon it.

There remains, however, the argument that the failure to take any steps to recover the wreck is sufficient evidence of intent to abandon, when considered in light of the lapse of 130 years. The Foundation contends that Aetna's failure to act is inconsequential because the technology has not previously been available to locate the wreck -- as evidenced both by the affidavit of Parsons and by the lack of previous success in locating the Lady Elgin despite numerous search efforts. Zych might respond that the lack of late-1980's technology did not dissuade others from attempting to locate the wreck. In light, however, of the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had

minimal chances for success.

Zych has not provided sufficient evidence from which a reasonable fact-finder could conclude that Aetna abandoned the wreck of the Lady Elgin. Accordingly, the Court finds that the Foundation's claim to the wreck must be upheld and Zych's claim for ownership must be dismissed.[1]

III. SCOPE OF THE JUDGMENT

The Foundation further seeks an order establishing its ownership rights over the wreck as against the State. In determining that the State was immune, the Court found that the action was, in part, against the State because the State had a colorable claim of ownership pursuant to the common law of finds and, alternatively, the Abandoned Shipwreck Act, 39 U.S.C. §§ 2101 et seq. Both of these bases for the State's ownership claim rest on the assumption that the vessel

---

1 Both parties submitted legal memoranda addressing abandonment and the validity of the Foundation's claim. Although neither party entitled its submission a "motion for summary judgment," the memoranda were filed pursuant to the Court's briefing schedule for "dispositive motions" and both parties made arguments based on the undisputed facts. Accordingly, the Court has treated the submissions as cross-motions for summary judgment. Because Zych has the burden of proof to show abandonment and has not submitted sufficient evidence to meet this burden, judgment is properly entered against him on the ownership claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) (summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Plaintiff's claim for salvage, however, remains pending.

has been abandoned. The Foundation reasons that because the Court has now found that the vessel was not abandoned, it is now clear that the State does not have a colorable ownership interest in the vessel. Accordingly, the State is not immune, and the judgment should run against the State along with the rest of the world.

The Foundation's logic makes sense on its face. Ordinarily, in an abundance of caution, the Court would enter a rule to show cause why the judgment should not enter against the State as well, and afford the State an opportunity to respond. However, the State was aware of the Foundation's desire that the judgment run against the State. That desire was expressed in the Foundation's memorandum of November 19, 1990, and was also addressed in Zych's memorandum filed the same date. Both of those memoranda were served upon the State's attorney, William Kane. A hearing was then held in open court on November 26, 1990. With respect to the State, the following colloquy occurred:

> THE COURT: . . . Now, Mr. Kane, tell me this, does the State intend to take any position in these proceedings?
>
> MR. KANE: No, Your Honor, it's the State's position we are no longer a party before this Court. And your order that was entered I believe on September has been appealed. In fact, the plaintiffs have filed their brief and we'll be responding. So it's our position we are not -- not involved in this case any more.
>
> THE COURT: Then what I am going to do is I am

going to make a finding on the record that you have waived any further participation in this case.

MR. KANE: That's fine, Your Honor. I think that was our intention. Our intention in this matter was to intervene solely to contest this Court's jurisdiction to enter a finding against the State.

THE COURT: All right.

MR. KANE: And we will continue on that course.

(Transcript of Proceedings, Nov. 26, 1990, at 5-6.) Toward the end of the hearing, after soliciting the remaining parties' views as to how to proceed, the Court asked, "So having heard all that, your position remains the same, Mr. Kane?" Mr. Kane replied, "That's right, Your Honor. Our position remains the same. We are not a party any longer and we are up in the Appellate Court right now." (Transcript at 11.)

The State thus had an opportunity to respond to the Foundation's argument and knowingly waived that opportunity.[2] Accordingly, the Court enters judgment

---

[2]The State might argue that it did not wish to take further part in the proceedings because it did not want to waive its immunity. However, the issue here bears directly on whether the State has immunity in the first place. The State does not waive its immunity merely by appearing to assert it. See Lady Elgin, 746 F. Supp. at 1350.

It might be asked why the Court decided the immunity question first, before proceeding to the merits of the Foundation's claim, thus running the risk that the decision on the Foundation's claim would change the immunity analysis. There were several factors that led the Court to

declaring that the Foundation is the sole owner of the shipwrecked Lady Elgin.

---

proceed the way it did. For instance, it was equally possible that a determination of the immunity issue could have rendered it unnecessary to reach the other issues in the case. Furthermore, at that time it seemed highly unlikely that the Foundation's claim would ultimately succeed. Never before, to the Court's knowledge, had such a claim by an insurer of a shipwrecked vessel succeeded. In the only other case where insurers attempted to make such a claim -- the Columbus-America case, the insurers had failed.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO.,
Plaintiff,

v.

The unidentified, wrecked and abandoned vessel,
believed to be the SB "LADY ELGIN"
Defendant

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE C0.,
Plaintiff,

v.

The unidentified, wrecked and abandoned vessel,
believed to be the "SEABIRD",
Defendant

Nos. 89 C 6501, 89 C 6502

746 F. Supp. 1334
1990 U.S. Dist. LEXIS 12180; 1991 AMC 359

September 13, 1990

Ilana Diamond Rovner, United States District Judge.

I. INTRODUCTION

The Lady Elgin, built in 1851, was a celebrated sidewheel steamer which carried passengers, mail and freight on Lake Michigan and Lake Superior. On September 8, 1860, she was overloaded with approximately 450 passengers returning to Milwaukee after attending a Democratic Party rally in Chicago for presidential candidate Stephen Douglas. A violent storm arose, decreasing the visibility, and she was fatally rammed by the lumber schooner Augusta. She sank soon afterwards in what is perhaps the most famous shipwreck in the history of the Great Lakes.[1] At least 100 passengers were saved, but some 300 perished in the calamity. Those who went down with the ship included so many Irish political activists that the sinking has been credited with transferring the balance of power in Milwaukee from the Irish to the Germans.

Diving enthusiasts have vied for years to become the discoverer of the Lady Elgin's remains, but until recently Lake Michigan refused to give up her treasure. In 1989, however, after 16 years of searching, plaintiff Harry Zych, who owns and operates American Diving and Salvage Company, discovered what he believes is the wreck of the

---

1

Even the United States Supreme Court has had occasion to comment on the wreck of the Lady Elgin: "The marine disasters upon these [Great] Lakes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, are immense. . . . The appalling destruction of life in the loss of the Erie upon Lake Erie, and of the Superior and Lady Elgin upon Michigan, are still fresh in the recollections of the country." Moore v. American Transportation Co., 65 U.S. (24 How.) 1, 38, 16 L. Ed. 674 (1860)

Lady Elgin. He then filed an in rem complaint in this Court seeking ownership of her remains or, alternatively, a salvage award.

On April 9, 1868, the Seabird, another sidewheel steamer which was carrying 100 passengers, sank in the waters of Lake Michigan. As described by author James L. Elliott:

> In late March of 1868, the Seabird was brought out of winter lay-up at Manitowoc and made ready for the coming summer season. She was given a thorough going over and freshly painted inside and out.
>
> During midmorning of April 8, 1868, she loaded passengers and freight for her first downbound trip of the new season. Her destination was Chicago with stops scheduled for Milwaukee, Racine, and Kenosha. Departure was at noon from Johnston's pier. Captain John Morris was in command.
>
> A news item and a small ad in the Milwaukee Sentinel on the morning of April 8, 1868, announced that the side-wheel steamer Seabird, Captain John Morris, would leave at 7:00 P.M. for Chicago inaugurating a new service for the season of 1868. The fare was $ 1.00, which was less than by railway, and there was no charge for staterooms.
>
> Everything went well on that first trip until Seabird was off Waukegan, a little after 6:00 A.M. on the morning of April 9. The night had been cold and the large stove in the main cabin had been kept going all

> night to provide some warmth and comfort for the passengers. As daylight came, the porter cleaned the fire in the cabin stove and then stepped to the rail to throw the still hot ashes over the side. Unfortunately he emptied his container into the wind and the hot ashes, fanned by the brisk northwesterly wind, blew back aboard and into the cargo stowed on the main deck. Some highly varnished tubs, packed in excelsior, were quickly ignited and the dread cry of "Fire!" swept the ship. As the flames made their way topside and into the cabin area they were fed by the newly painted woodwork and the entire steamer was soon engulfed in a mass of flame. There was no place for the terrified passengers and crew to go except over the side into the numbing cold waters of Lake Michigan. Survival in the 36-degree water lasted only a few minutes for most. . . .
>
> Only two passengers were saved. They were A.C. Chamberlain and Edwin Henneberry, both from Sheboygan.

J. Elliott, Red Stacks Over the Horizon 41-43 (1967).

The remains of the Seabird lay hidden on the bed of Lake Michigan until they too were discovered by Zych in 1989. Zych then filed an in rem action seeking ownership of the Seabird or salvage award.

The two cases were consolidated because they raised similar issues. Plaintiff moved for an order of default, but before that motion could be ruled on, the Illinois Department of Transportation and the Illinois Historic Preservation

Society (collectively, "the State") intervened for the limited purpose of moving to dismiss the cases on the basis of the State's sovereign immunity guaranteed by the Eleventh Amendment of the U.S. Constitution. Plaintiff argued that the Eleventh Amendment did not bar the action, and that even if the Eleventh Amendment would otherwise bar the action, the State had waived its immunity. Plaintiff's arguments included a challenge to the constitutionality of the Abandoned Shipwreck Act of 1988, 43 U.S.C. 2101 et seq. Accordingly, the United States intervened and submitted briefs defending the Act's constitutionality. Amicus briefs were also submitted by various interested parties.[2]

While the motion to dismiss was pending, plaintiff formed the Lady Elgin Foundation in order to pursue another avenue of gaining possession of the wreck. The Foundation reached an agreement with CIGNA Property & Casualty Company, which holds a claim of title to the wreck based on its insurance of the hull and cargo of the Lady Elgin and its payment on a claim by its insured. Pursuant to that agreement, CIGNA transferred its ownership interest in the vessel to the Foundation in exchange for twenty percent of the proceeds of any artifacts recovered from the wreck and sold by the Foundation. After reaching this agreement, the Foundation moved to intervene in the Lady Elgin case for the purpose of joining in plaintiff's objections to the State's motion to dismiss. Because this development placed the Lady Elgin case in a very different posture than the Seabird case,

---

[2]The American Sport Divers Association submitted an amicus brief on behalf of plaintiff. The National Trust for Historic Presrvation in the United States submitted an amicus brief on behalf of the State.

the Court vacated its consolidation order.[3]

II. APPLICABILITY OF ELEVENTH AMENDMENT

Analysis of the applicability of the Eleventh Amendment[4] in the context of an in rem action concerning a shipwreck is governed by the case of Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982). That case involved the wreck of a 17th-century Spanish galleon discovered in international waters off the coast of Florida. During litigation over title to the wreck, the plaintiff filed a motion for an order commanding the United States Marshal to arrest and take custody of artifacts which were in the possession of officials of the State of Florida. Florida opposed the motion on the ground of sovereign immunity.

A plurality of the Supreme Court stated that three questions must be answered in order to resolve the Eleventh Amendment issue:

---

[3]Pending at this time, but not yet fully briefed, is the Foundation's motion for leave to file an answer and claim of ownership.

[4]The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." In Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), the Court held that, notwithstanding the amendment's restrictive language, the Eleventh Amendment applies as well to bar an action brought against a state by a citizen of that state.

> (a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to retroactive award that requires "the payment of funds from the state treasury"?

458 U.S. at 690, 102 S. Ct. at 3317. More specifically, an action is barred if it is directly against the state itself; if it challenges the conduct of state officials who have exercised legitimate authority; or if it seeks a retroactive award requiring payment of state funds. The Court held that the motion for arrest was not against the State itself but rather against state officials; that the action of those state officials was taken without legitimate authority; and that the arrest warrant did not seek any attachment of state funds and would impose no burden on the state treasury. Id. at 691-98, 102 S. Ct. at 3318-21. Accordingly, the Eleventh Amendment did not bar the arrest warrant. The Court held, however, that the Eleventh Amendment did bar federal judicial determination of the ownership issue itself. Id. at 700, 102 S. Ct. at 3322.

A. Nature of Relief Sought

Because the third Treasure Salvors question -- the nature of relief sought -- is the most straightforward in this case, the Court addresses it first. In Treasure Salvors, the Court found that the relief sought by the plaintiff was permissible prospective relief which comported with the principles of

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). It noted that the arrest warrant in issue "sought possession of specific property" and "did not seek any attachment of state funds and would impose no burden on the state treasury. Id. 458 U.S. at 698, 102 S. Ct. at 3321. The instant case is similar in all relevant aspects. Although the pending issue concerns the in rem action itself rather than an arrest warrant, in both cases the primary goal of the plaintiff is recovery of specific property. See also Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel ("Cobb Coin II"), 549 F. Supp. 540, 554 (S.D. Fla. 1982) (recovery sought in in rem action was consistent with Eleventh Amendment where award would be in form of artifacts rather than payment of funds from state treasury).

The State contends that the Court must look to plaintiff's request for a salvage award as an alternative form of relief if his claim to ownership of the property is denied. Citing Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893, 904 (5th Cir.), cert. denied, 464 U.S. 818, 104 S. Ct. 77, 78 L. Ed. 2d 89 (1983), the State further argues that a salvage award constitutes a monetary award against the state because a salvage award cannot be granted in specie, or in terms of the recovered artifacts themselves.

The Court finds this argument to be flawed in two respects. First, because the lawsuit seeks a salvage award only as an alternative request in case the primary relief is denied, the request for a salvage award is not determinative of the nature of the action. Second, the Court does not agree that a salvage award is necessarily the type of relief forbidden by the Eleventh Amendment. In Platoro, the issue was not whether

a salvage award made the Eleventh Amendment applicable but rather whether the district court erred in ordering, as a salvage award, that the state either surrender the artifacts to the salvor or auction the artifacts and give the proceeds to the salvor. The Court stated that it could find no precedent in which "the salvage award was expressed in terms of the res rather than in dollars, except where the salvage award was made alternatively with an award of title to the res under the law of finds." 695 F.2d at 903-04. The court cited, as one example, Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978), in which the court expressly stated that "salvage awards may include the entire derelict property." The validity of Platoro's statement is doubtful. For instance, in Cobb Coin II, the court stated: "[T]he appropriate form of [salvage] award in a case like this should differ from traditional awards. It should be given in specie because the property saved is uniquely and intrinsically valuable beyond its monetary value." 549 F. Supp. at 561. See also Owen, Legal Troubles with Treasure, 16 J. Mar. L. & Comm. 139, 170 (1985) ("An award may also be made in specie, and this is particularly suitable in treasure salvor cases."). In any event, plaintiff here does seek a salvage award only as an altenate form of relief, and even the logic of Platoro would suggest that a salvage award consisting of artifacts themselves would thus be permissible.

The State also argues that even if the lawsuit seeks only injunctive relief, it is barred by the Eleventh Amendment pursuant to Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). This argument is unpersuasive. Pennhurst concerned only actions in federal court seeking to compel state officials to conform

their conduct to state law. Plaintiff's in rem complaint in this case does not rely on state law, and Pennhurst is therefore inapplicable.

The Court concludes that the form of relief sought by plaintiff is not inconsistent with the Eleventh Amendment.

B. Action Against State

1. Nature of Inquiry

In a case, such as this one, where the plaintiff has not challenged any specific action by state officials and the state seeks dismissal of the underlying in rem action, the three-question test set forth in Treasure Salvors must be altered somewhat. It no longer makes sense to ask the second question as framed in Treasure Salvors -- whether the conduct of the state officials is ultra vires or unconstitutional. See Cobb Coin II, 549 F. Supp. at 551 ("Presumably, the second question is immaterial if the state officials are not named defendants."). However, this second question resurfaces in another form when courts attempt to answer the first question -- whether the suit is brought directly against the state. In rem suits to determine ownership of abandoned shipwrecks generally seek title against "all the world," including "states." Thus although they are not brought directly against states, they implicate states' interests in the same way they implicate the interests of any other possible claimants. The minority position, in answer to the first Treasure Salvors question, is that such an in rem action simply is not a suit brought directly against the state. See Cobb Coin II, 549 F. Supp. at

551-52[5] Cf. Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, 895 F.2d 116 (3d Cir. 1990).[6] More

---

[5]The Cobb Coin court stated:

> This is not a suit against the State or its officers. The plaintiff . . . filed its in rem complaint invoking the admiralty jurisdiction of the United States District Court . . . . This action is not against any State officers or against the State itself; it is an action in which the plaintiff seeks to have his federal rights under the general law of finds or the maritime law of salvage decided as to these artifacts which were admittedly beneath navigable waters. It is 'against' property which lay untouched and, from a legal standpoint, undiscovered before the plaintiff began this suit. The wrecked and abandoned sailing vessel is not in the possession of the State or any of its officers. . . . The State simply has not been sued here; it has voluntarily undertaken to enter this otherwise complete litigation. This suit is not against the State and is not barred by the Eleventh Amendment.

549 F. Supp. at 551-52.

[6]In Sindia (a case which none of the parties brought to the Court's attention), the court held that an in rem action is not a suit against state, even assuming that the state has a colorable ownership interest. This Court rejects the Sindia court's analysis, which it views as contrary to the weight of the case law and as based on a misreading of Treasure Salvors. The Sindia court stated:

> Justice Stevens, for the plurality, explained that a classic admiralty in rem action in which the plaintiffs claim only an ownership interest in property and are not seeking personal jurisdiction over the State by seizure of the vessel is not barred by the Eleventh Amendment. See Treasure Salvors, 458 U.S. at 699, 102 S. Ct. at 3322. On the other hand, an admiralty action brought in rem solely for the purpose of giving the court jurisdiction over a damage claim against a State is barred by the Eleventh Amendment. Id.

often courts appear to have assumed that actions seeking to determine ownership against "all the world" are, in effect, suits against states because states are included in the concept

---

The passage in Treasure Salvors to which Sindia apparently refers comes in the Supreme Court's discussion of the third question -- the nature of the relief sought. The Supreme Court distinguished the case before it from In re New York (I), 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1921), and In re New York (II), 256 U.S. 503, 41 S. Ct. 592, 65 L. Ed. 1063 (1921), which involved attempts to collect damages from the state by instituting in rem proceedings against vessels. The Supreme Court stated:

> In these (New York) cases the plaintiff did not claim an ownership interest in the vessels and did not question the State's assertion of ownership. The sole purpose of the attempted arrests was to enable the court to acquire jurisdiction over a damages claim that was otherwise barred by the Eleventh Amendment. In this case Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials. The present action is not an in personam action brought to recover damages from the State. The relief sought is not barred by the Eleventh Amendment.

458 U.S. at 699, 102 S. Ct. 3322. Thus the Court held merely that the relief sought was permissible, after already finding that the state officials' claim to the property was not colorable. Furthermore, the relief referred to was not the relief sought by the underlying action -- ownership against all the world -- but rather the relief sought by the arrest warrant. The Supreme Court by no means held that the Eleventh Amendment permits in rem actions against property to which a state has a colorable claim of ownership.

Ultimately, however, the Sindia court's misreading of Treasure Salvors was harmless. Sindia could not avoid the plain holding of Treasure Salvors -- although in light of Sindia's analysis it found this holding "curious" -- that the question of the state's interest in the property could not be determined without its consent. 895 F.2d at 120. Sindia thus held that the action could go forward with respect to the competing claims of all claimants other than the state.

of "all the world." See Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989); Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983); Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377 (S.D. Fla. 1988); Subaqueous Exploration v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597 (D. Md. 1983). See also Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989).[7] However, as these courts have implicitly recognized,

---

[7]Although the Court does not always agree with the precise reasoning employed in these cases, all of these cases illustrate the necessity of addressing the legitimacy of the state's claim in order to determine whether the action is brought directly against the state.

In Subaqueous, the court examined in detail the basis for the state's claim of ownership before finding: "The complaints specifically name the vessels as defendants therein. Consequently, these suits are directly against vessels over which the State of Maryland asserts a claim of title. As such, the essential nature and effect of these proceedings are that they are suits directly against the State of Maryland." 577 F. Supp. at 607. In Jupiter, the court similarly engaged in a detailed analysis of the state's claim in finding that the Eleventh Amendment barred the plaintiff from succeeding on its claim of ownership. 691 F. Supp. at 1384. In Marx, the court assumed, without holding, that a colorable claim on the part of the state was required in order to find that te case was barred by the Eleventh Amendment. 866 F.2d at 299. The court then found that the state's claim was colorable and held that the in rem action should have been dismissed for lack of jurisdiction. Id. at 301-02.

In Maritime, the court affirmed the dismissal of an in rem action on the basis of sovereign immunity. The court stated:

> It is a suit by a corporate citizen of Delaware in all but form against the Commonwealth of Massachusetts. While the Commonwealth is not a named defendant, it is beyond cavil that Maritime recognized the state as its principal opponent. Maritime's prayer for relief seeks to enjoin all government

if a particular state would have no colorable claim of title, then the lawsuit cannot legitimately be treated as an action against that state. In other words, for a state to show that it

---

> agencies from interfering with its title. Unlike the Treasure Salvors plaintiff, moreover, Maritime demanded the compelled presence of "all . . . states . . . claiming an interest" in the vessel (emphasis supplied). It is self-evident that this demand was directed towards the Commonwealth. The ship lies within a quarter mile of the Massachusetts shoreline. The Commonwealth has asserted title to this and all other "underwater archeological resources" within its inland and coastal waters continuously since 1973. Mass.G.L. ch. 6 sect. 180. The Commonwealth is the only party to respond to Maritime's complaint and to the Warrant for Arrest in Rem. The courts are not blind to the real posture of the parties.

717 F.2d at 8. The analysis in Fitzgerald is similar.

The Court cannot agree with Maritime's emphasis on the plaintiff's subjective expectations concerning the likelihood that the state would be a claimant. To the extent that Maritime rested on plaintiff's identification of states and governmental agencies as included in the types of parties against whom it sought to assert ownership, this Court also cannot agree. Whether or not an in rem complaint expressly refers to "states" and "governmental agencies," it generally seeks title against "all the world." Questions of sovereign immunity should not turn on the legalese employed by the complaint to elaborate on the meaning of "all the world." Finally, this Court cannot agree with the later statement in Maritime that "because this is not a claim against a named state official, and because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit, we need not reach the colorability of the Commonwealth's claim." 717 F.2d at 8. As the passage quoted above illustrates, the Maritime court did indeed appear to consider the colorability of the claim in determining that the action was one against the state. (Certainly the court would not have held that the suit was one against the State of, say, Wyoming, were there no colorable basis for a claim by Wyoming, even if Wyoming appeared to assert title.)

is a defendant and thus is entitled to assert sovereign immunity, the state must show that it has a colorable claim of ownership. See Owen, Legal Troubles, at 154. Thus, much as in the Treasure Salvors type of situation, where the court must ask whether the conduct of the state officials in asserting possession or ownership is legitimate, a court faced with a motion by a state to dismiss an in rem action on the basis of sovereign immunity must inquire whether the state's claim of ownership is colorable. The first two Treasure Salvors questions are thus collapsed. If the state's claim is colorable, the lawsuit is against the state; if the state's claim is not colorable, the lawsuit is not against the state.[8]

2. Colorable Claim.

a. State Statutes

In support of its claim of ownership over the shipwrecks, the State first relies on a number of Illinois statutes. In other cases, state statutes have been held to create a colorable claim of ownership by the state. Thus in Treasure Salvors, the state relied on Fla. Stat. sect. 267.061(1)(b), which provided:

> It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value

---

[8]Engaging in this preliminary inquiry does not cross the line into an impermissible determination of the merits of the state's claim. Although Treasure Salvors forbade federal judicial adjudication of the state's right to the property, it permitted, as necessary to the Eleventh Amendment question, inquiry into the similar issue of the legitimacy of the conduct by the state officials.

> which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection.

458 U.S. at 673-74, 102 S. Ct. at 3309. In Subaqueous, supra, the state's claim was based in part on sect. 2-309 of Maryland's Natural Resources Article, which provided that "any object or material of historical or archaeological value or interest found on an archeological site or land owned or controlled by the State is the property of the State." 577 F. Supp. at 606. In Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923, 924 (E.D.N.C. 1987), the court noted the existence of N.C. Gen. Stat. sects. 121-22, which declares that North Carolina has "title to all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts which have remained unclaimed for more than 10 years lying on the bottoms of navigable waters of the state." See also Maritime, supra, 717 F.2d at 8 (relying in part on Mass. G. L. ch. 6 sect. 180, which provides that "title to underwater archaeological resources located within the inland and coastal waters of the commonwealth is hereby declared to be in the commonwealth," and defines "archaeological resources" as including "sunken ships, which have remained unclaimed for one hundred years or more").

The Illinois statutes identified by the State, however, do not grant the State an ownership interest in the shipwrecks. Unlike the statutes quoted above, they do not vest title in the State. For instance, the Rivers, Lakes and Streams Act

provides in part:

> The Department of Transportation shall upon behalf of the State of Illinois, have jurisdiction and supervision over all of the rivers and lakes of the State of Illinois, wherein the State of Illinois or the people of the State have any rights or interests . . .

Ill. Rev. Stat. ch. 19 para. 52. By its terms, this statute does not grant ownership to the State over anything which the State does not already own; it merely describes the powers and duties of a particular state agency.

The State also relies on the Human Grave Protection Law, Ill. Rev. Stat. ch. 127 sects. 2661 et seq. This statute contains no reference to ownership, title or possession. It merely provides for civil and criminal penalties against those who disturb human skeletal remains and grave artifacts. Whether or not the statute can be construed to apply to the remains of the Lady Elgin and the Seabird, it does not purport to give the State an ownership interest in those remains.[9]

---

[9]Because the Court agrees with plaintiff that the state statutes do not confer ownership on the State, the Court does not reach plaintiff's alternative argument that the statutes are preempted by federal law.

The State also based its ownership claim on the Aboriginal Records and Antiquities Act, Ill. Rev. Sta. Ann. ch. 127 sect. 133c1 et seq. When the briefs were submitted in this case, that statute applied to "aboriginal records and other antiquities, including mounds, earthworks, forts, burial and village sites, mines or other relics found upon or within any of the lands owned by or under the control of this State." Ill. Rev. Stat. Ann. ch. 127 sect. 133c1 (1981). The court has serious doubts as to whether this language could be interpreted to include abandoned shipwrecks.

b. Common Law and the Submerged Lands Act

The Submerged Lands Act, 43 U.S.C. 1311, makes clear that the states have title to all lands and natural resources beneath navigable waters within the boundaries of the respective states.[10] The State relies in part on this Act itself for its ownership claim, contending that the shipwrecks are

---

However, during the pendency of the instant motions the statute was substantially revamped under the title "Archaeological and Paleontological Resources Protection Act." Ill. Rev. Stat. Ann. ch. 127 sect. 133c.01 (Supp. 1990). In its present form, the Act specifically applies to shipwrecks. Ill. Rev. Stat. Ann. ch. 127 sect. 133c.02(a) (Supp. 1990). Although the parties have had ample opportunity, they have not addressed the retroactivity of this amendment or sought leave to do so. In light of the Court's conclusion below that there are other colorable bases for the State's ownership claim, the Court does not reach the issue of whether an ownership claim based on this statute would be colorable.

[10]The Act provides, in part:

(a) . . . It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) . . . (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources . . . .

"natural resources." The Court is unwilling to engage in such a stretch of the meaning of "natural resource;" a shipwreck is not "natural." Cf. Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel ("Cobb Coin I"), 525 F. Supp. 186, 214-16 (S.D. Fla. 1981) (Act applies only to natural resources and does not give states authority to assert claims over shipwrecks); Commonwealth v. Maritime Underwater Surveys, Inc., 403 Mass. 501, 531 N.E.2d 549, 552-53 (1988) (Submerged Lands Act did not give state title to shipwrecks). The Act does, however, prove instrumental in giving the State a colorable ownership interest in the shipwrecks by making clear that the lake bed on which the shipwrecks lie belongs to the State.[11] With ownership of the lake bed established, the common law of finds gives the State a colorable claim of ownership to the shipwrecks found on that lake bed.

The law of finds generally provides that the first finder to take possession of lost or abandoned property with the intention to exercise control over it acquires title. See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985); Jupiter Wreck, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F. Supp. 1377, 1386 (S.D. Fla. 1988); Chance v. Certain Artifacts Found and Salvaged from the Nashville, 606 F. Supp. 801, 804 (S.D. Ga. 1984), aff'd mem., 775 F.2d 302

---

[11] Plaintiff does not expressly state that the shipwreck is located within the State's boundaries. However, the complaint does assert that the shipwreck is located "within the territorial jurisdiction of this Court." Plaintiff also has not responded to the State's assertion that it is undisputed that the shipwreck lies within the State's boundaries.

(11th Cir. 1985). An exception applies, however, to vest title in the owner of the land if the property is found embedded in the land. Klein, 758 F.2d at 1514; Jupiter Wreck, 691 F. Supp. at 1386; Chance, 606 F. Supp. at 805. Abandoned shipwrecks are generally considered to be "embedded" in the submerged land. See Klein, 758 F.2d at 1514; Jupiter Wreck, 691 F. Supp. at 1386; Chance, 606 F. Supp. at 805-07. In this case, the State has contended that the shipwrecks are embedded in submerged land within the State's boundaries. Plaintiff has not contended otherwise, but argues that the State has no knowledge of whether the wrecks are embedded. In ruling on the State's motion to dismiss, the Court cannot determine title, but may only determine whether the State's claim of ownership is colorable. Considering the cases cited above, the shipwrecks are likely embedded in submerged lands which the State owns pursuant to the Submerged Lands Act, and the embeddedness exception of the common law of finds gives the State a colorable claim of ownership in the shipwrecks.[12]

---

[12]It might be contended that the common law of salvage applies rather than the law of finds. Pursuant to the law of salvage, the provision of salvage services to an imperiled vessel gives rise to a maritime lien. In order for the law of salvage to apply even when a vessel is abandoned, it is presumed that the property has not been divested of title. The property is sold by the court, and the salvor receives a portion of the proceeds as compensation. See Chance, 606 F. Supp. at 804.

The prevailing view is that in the context of historic, abandoned shipwrecks, the law of finds applies rather than the law of salvage. See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987); Jupiter Wreck, 691 F. Supp. at 1385; Chance, 606 F. Supp. at 804; Subaqueous, 577 F. Supp. at 611. A salvage award provides an incentive to salvors and thus helps to protect the owner of the property against the loss of that property. See Jupiter Wreck, 691 F. Supp. at 1388. To apply the law of

c. Abandoned Shipwreck Act

The State also contends that it has a colorable claim to ownership in the shipwrecks pursuant to the Abandoned Shipwreck Act, 43 U.S.C. sect. 2101 et seq. ("the ASA"). The heart of the ASA is 43 U.S.C. sect. 2105, which provides in part:

> (a) United States title
>
> The United States asserts title to any abandoned shipwreck that is --
>
> (1) embedded in submerged lands of a State . . . .
>
> (2) embedded in coralline formations protected by a State on submerged lands of a State; or

---

salvage, however, by creating the fiction of continuing ownership even ater the property has long been abandoned is rather absurd, especially when the law of finds provides a rational method for determining rights in the property. See Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 336 (5th Cir. 1978); Jupiter Wreck, 691 F. Supp. at 1385.

In any event, it appears that application of the law of salvage would often lead to the same result. Under the law of salvage, the owner of the vessel may reject the salvage services, in which event the salvor is not entitled to an award. See Platoro, 695 F.2d at 901-02. In enacting sect. 2106, Congress specifically rejected salvage services on the vessels subject to the ASA. Furthermore, it is reasonable to interpret state preservation statutes which limit the ability of divers and salvors to explore or excavate abandoned shipwrecks as expressing a rejection of salvage services.

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Notice of shipwreck location; eligibility determination for inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

Also significant for purposes of this case is 43 U.S.C. sect. 2106(a), which provides, "The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies."

Plaintiff has not argued that the ASA does not, by its

terms, grant title of the vessels to the State.[13] Rather, plaintiff argues that the ASA is unconstitutional.

Article III, section 2 of the United States Constitution extends the judicial power to "all cases of admiralty and maritime jurisdiction." Based on this clause, courts have recognized two constitutional limits on Congress' ability to alter maritime law:

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments . . . shall be co-extensive with and operate uniformly in the whole of the United States.

Panama Ry. Co. v. Johnson, 264 U.S. 375, 386-87, 44 S.

---

[13]Section 2105(b) provides:

> The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(Emphasis added.) It might be argued that the ASA does not apply to a given shipwreck if the United States or the applicable state has not "asserted" title to the wreck nor given any public notice of its location. Plaintiff, however, does not raise this issue and the Court thus does not reach it.

Ct. 391, 394, 68 L. Ed. 748 (1924). See also Hurst v. Triad Shipping Co., 554 F.2d 1237, 1244 (3d Cir.), cert. denied, 434 U.S. 861, 98 S. Ct. 188, 54 L. Ed. 2d 134 (1977). Plaintiff argues that the ASA violates both of these principles.

1) Exclusion from Admiralty Jurisdiction. First, plaintiff argues that the ASA impermissibly excludes from federal jurisdiction a significant aspect of maritime law. He argues that the Constitution prohibits Congress from removing an entire class of maritime law from the jurisdiction of the federal courts. Although Congress may substantively alter maritime law, in doing so it "necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction." The Thomas Barlum, 293 U.S. 21, 44, 55 S. Ct. 31, 38, 79 L. Ed. 176 (1934). The resolution of questions of title over abandoned shipwrecks is a significant, central element of traditional maritime law. The ASA, however, purports to simply decide questions of title and render marime common law inapplicable. In doing so, plaintiff argues, Congress has intruded on the constitutional power of the judicial branch and violated the Constitution's designation of the federal courts as the arbiter of questions over title to abandoned shipwrecks.

The Court agrees with plaintiff that the law of finds and law of salvage are significant elements of traditional maritime law. The Court cannot agree, however, that the ASA has impermissibly interfered with federal admiralty jurisdiction. Plaintiff's argument confuses the issues of substantive law and jurisdiction. By including admiralty and maritime jurisdiction in the judicial power, the Constitution has been interpreted as adopting for the United States the existing maritime common law, which could subsequently by modified

be Congress within certain limits. See, e.g., The Thomas Barlum, 293 U.S. at 43, 55 S. Ct. at 38. However, the limitation on Congress' ability to interfere with federal admiralty jurisdiction "places boundaries on federal power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies. Lucas v. "Brinknes" Schiffahrts Ges., 387 F. Supp. 440, 443 (E.D. Pa. 1974) (three-judge court). See also Hurst, 554 F.2d at 1244-45. As the Supreme Court has stated:

> The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States. When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require." The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country. But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.

The Thomas Barlum, 293 U.S. at 43-44, 55 S. Ct. at 38. Thus the Constitution specifies the body which shall be responsible for applying maritime law -- the federal judiciary -- but does not prohibit alteration of the substantive maritime law which shall be applied. The ASA does not run afoul of

this principle. It determines what the substantive law is, but it does not restrict the jurisdiction of federal courts to resolve questions concerning application of that law.[14]

2) **Uniformity.** Plaintiff's second argument that the ASA is unconstitutional is that the ASA destroys the uniformity which is constitutionally mandated for congressional enactments in the realm of maritime law. As plaintiff points out, the need for uniformity provided the rationale for the constitutional grant of admiralty jurisdiction to the federal courts. See Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834 (1920). Enactments which are inconsistent with such uniformity thus run afoul of the Constitution.

In order to address plaintiff's uniformity arguments, it is necessary to review some of the highlights in the history of the uniformity doctrine. In The Lottawanna, 88 U.S. (21 Wall.) 558, 22 L. Ed. 654 (1874), the Supreme Court held that a state legislature could confer maritime liens, enforceable in admiralty jurisdiction, for supplies and repairs furnished to a ship in her home port, even though the general

---

[14]No congressional enactment has yet been struck down on the basis that it impermissibly interfered with the admiralty jurisdiction of the federal courts. Hurst, 554 F.2d at 1244. "In light of the Supreme Court's repeated approval of major congressional changes in admiralty jurisdiction, see, e.g., Victory Carriers, Inc. v. Law, 404 U.S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971); Gutierrez v. Waterman S.S. Co., 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596 (1943), even this ban on congressional interference with jurisdiction can relate only to extreme tampering with the territorial or subject matter jurisdiction of admialty and maritime courts." Id. at 1245.

maritime law did not provide for such liens. In doing so, the Court stated:

> [T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. at 575. This language provided the linchpin for the Supreme Court, in Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S. Ct. 524, 49 L. Ed. 363 (1917), to find unconstitutional a New York workmen's compensation statute as applied to a longshoreman who was fatally injured on a gangway between a ship and the pier. The Court reasoned that because of the uniformity mandated by the Constitution, any modification to the general maritime law must come from Congress rather than individual states. Because Congress had not acted in the sphere of workmen's compensation, it must have intended that no change be made. The state's application of its workmen's compensation act to the longshoreman came within the scope of maritime law, and it thus conflicted with the nationally uniform system contemplated by congressional inaction. 244 U.S. at 213-18, 37S. Ct. at 528-30. The Court further stated:

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by

> her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded.

244 U.S. at 217, 37 S. Ct. at 529.

Congress attempted to alter this result in 1917 by amending the Judiciary Act to add the emphasized language:

> The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: . . . all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state . . . .

40 Stat. 395 (1917) (emphasis added). In Knickerbocker, the Court held that this statute was unconstitutional because it contravened the uniformity principle. Pursuant to that principle:

> The Constitution . . . took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of [admiralty and maritime] law or to interfere with its proper harmony and

> uniformity in its international and interstate relations.

253 U.S. at 160, c40 S. Ct. at 440. The Court then reasoned that the Constitution forbade amendment of the general maritime law except by Congress, and that Congress -- in the interest of uniformity -- was prohibited from delegating this function to the states. 253 U.S. at 164, 40 S. Ct. at 441.

Undeterred, Congress tried again. Reading Knickerbocker narrowly as quarreling solely with the language Congress chose, it amended the Judiciary Act to remove from exclusive federal jurisdiction suits by "claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States." 42 Stat. 634 (1922). This formulation was struck down by the Court in State of Washington v. W. C. Dawson & Co., 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646 (1924). The Court held that the differing language did not make the statute materially different from the previous one, and that the case was governed by Jensen and Knickerbocker. In concluding, the Court stated:

> This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any state to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with

> the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

264 U.S. at 228, 44 S. Ct. at 305.

The same year, in Panama Ry. Co. v. Johnson, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924), the Court upheld the Jones Act, 46 U.S.C. sect. 688, which made clear the existence of common law remedies for seamen injured in the course of their employment by the negligence of the master or crew members. The Court recognized that the Constitution places certain limitations on congressional action in the field of maritime law, but held that the Jones Act did not exceed those limitations. Among the limitations recognized was that the congressional enactments "shall be co-extensive with and operate uniformly in the whole of the United States." 264 U.S. at 387, 44 S. Ct. at 394. Thus, "as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rule there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation." Id. at 388, 44 S. Ct. at 394.

More recently, the Court revisited the uniformity doctrine in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986). In Offshore, the Court read the Death on the High Seas Act, 46 U.S.C. sects. 761

et seq., as preempting common law wrongful death remedies, notwithstanding the Act's [provision] that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected." 46 U.S.C. sect. 767. In light of the uniformity principles contained in Knickerbocker and Jensen, the Court interpreted this provision as merely a jurisdictional saving clause, ensuring that actions could continue to be brought in state court, rather than as a requirement that state substantive law apply on the high seas. 477 U.S. at 220-229, 106 S. Ct. at 2493-98.

Plaintiff first contends that the ASA destroys uniformity because it applies only to certain shipwrecks, and the terms it uses to define those shipwrecks -- such as "embedded" -- are unreasonably vague. The ASA defines "embedded" as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. sect. 2102(a). Plaintiff argues that terms such as "firmly affixed" and "tools of excavation" are so vague that they will lead to endless disputes.

This argument may be disposed of rather simply. It requires too broad a reading of the uniformity doctrine. A review of the cases described above reveals that by "uniformity," courts refer to the need for a consistent national law on maritime matters. The Constitution, under this Principle, does not allow Congress or the states to create a scheme in which matters of maritime law vary from jurisdiction to jurisdiction within the United States. That the ASA may change the substantive law governing certain shipwrecks does not destroy this uniformity. Different

shipwrecks may be treated differently, but only due to their characteristics, not due to varying laws among jurisdictions. Furthermore, the Court is not at all convinced that, with respect to the aspects of the ASA material to this case, it has changed in any significant way the law governing shipwrecks. As described above (supra at 1342-43), the Submerged Lands Act and the common law of finds already operate to give states title to abandoned shipwrecks embedded in seabeds under their territorial waters. The ASA merely confirms this result.

The ASA's use of words that require judicial interpretation does not alter this conclusion. All statutes include words which courts must interpret, and the ASA is not unique in this respect. Indeed, there is already a body of case law interpreting such terms as "embedded." (See supra, at 1343.) The ASA's use of such words may, at the most, lead to some inconsistency between interpretations of the statute by lower courts. Such inconsistency, however, is not the kind of variance of law between jurisdictions prohibited by the uniformity doctrine.

Plaintiff contends that the ASA also destroys uniformity by transferring title to the states, thus giving states the power to enact widely divergent laws governing the shipwrecks. Furthermore, plaintiff contends that the law will differ in those areas which remain subject to federal jurisdiction, such as territorial waters of the United States or Native American tribes, where the laws of salvage and finds will continue to apply.

This argument raises a more colorable challenge to the ASA's constitutionality. Plaintiff's contention that the ASA

gives control of shipwrecks to the states, which are free to enact inconsistent laws governing those shipwrecks, appears on its face to implicate the kind of concerns underlying the uniformity doctrine. However, those concerns evaporate upon closer examination. The function of maritime law with respect to shipwrecks, specifically the law of finds and the law of salvage, is to determine ownership over a wreck and possible salvage awards. It does not govern what the owner of the wreck does with the artifacts or proceeds once ownership in those artifacts or proceeds is determined. For instance, were plaintiff to prevail in this action, be awarded title to the Lady Elgin and the Seabird, and commence selling for profit the artifacts he removed from the wrecks, maritime law would not govern his sales transactions. If various states, through their commercial codes, regulated such sales transactions differently, the lack of uniformity would not pose a constitutional challenge to those codes based on the federal admiralty jurisdiction. Similarly, the maritime law -- of which the ASA is now part -- governs questions of title to the shipwrecks which are subject to its coverage. Once the maritime law has operated to vest title to those shipwrecks in the states, the possible inconsistencies in the treatment of the wrecks by the states does not create constitutional problems.

The importance of this distinction may be further illustrated by reference to one of the ongoing concerns identified in the Supreme Court's discussions of uniformity. The Supreme Court, when it has elaborated on the need for a nationally uniform maritime law, has expressed concern for the burdens on commerce of inconsistent laws among jurisdictions. For example, a ship that docked at ports in many different states might be subject to widely varying laws concerning compnsation of injured workers. See, e.g., Washington,

supra, 264 U.S. at 228, 44 S. Ct. at 305. This concern for commerce and the need for a uniform standard to guide a party's conduct is not implicated by the ASA. The shipwrecks are stationary, each subject to the jurisdiction in which it is located. The ASA sets forth very specific standards for determining when title to those shipwrecks is vested in the states. Those standards do not change from jurisdiction to jurisdiction.

Thus the types of nonuniformities identified by plaintiff are not such as to render the ASA unconstitutional.[15] Accordingly, the ASA gives the State an alternative colorable claim to ownership of the Lady Elgin and the Seabird.

Implicit in plaintiff's brief is the further argument that the result of the analysis set forth in the text is to deprive plaintiff of any forum at all to litigate the ownership of the wrecks. Whether the State actually has ownership of the wrecks (as opposed to whether its claim is colorable) is a question which may be ripe for judicial decision but which the Eleventh

---

[15]In its amicus brief, the American Sport Divers Association raises several other arguments under the rubric of the ASA's alleged lack of uniformity. It argues that Congress intended to regulate only shipwrecks of historic value, but that its language goes far beyond such shipwrecks. It also argues that allowing states to claim title to wrecks which have not yet been identified or discovered deprives divers and salvors of the fruits of their labor. Because of a lack of public funds for salvaging and preservation operations, the Association argues that most wrecks will remain undiscovered without incentives for private salvors and divers. Although these arguments raise interesting issues with respect to the wisdom of the ASA, they do not implicate the uniformity required by the Constitution with respect to admiralty law.

Amendment, as interpreted here, forbids this Court to decide. Yet the federal jurisdiction over maritime matters is exclusive, see 28 U.S.C. sect. 1333, so the ownership question cannot be litigated anywhere else.

Although this argument is superficially attractive, it rests on an overly strict view of the exclusive federal jurisdiction created by sect. 1333. This "exclusiveness" has always been "somewhat illusory." Jupiter Wreck, 691 F. Supp. at 1391, quoting 7A Moore's Federal Practice para. 210 at 2201 (2d ed. 1988). State court jurisdiction has always been concurrent over certain maritime matters. Jupiter Wreck, 691 F. Supp. at 1391. Furthermore, to the extent the Eleventh Amendment conflicts with sect. 1333, the Eleventh Amendment controls; and to the extent the ASA may be read as conflicting with sect. 1333, the ASA is a more specific statute which takes precedence over the general provisions of sect. 1333. The Court thus finds that sect. 1333 does not require assertion of federal jurisdiction over this case in the face of the contrary result mandated by the Eleventh Amendment and the ASA.

Because the State has a colorable claim to ownership of the shipwrecks, the action is a suit against the State. Pursuant to Treasure Salvors, it must therefore be dismissed as barred by the Eleventh Amendment unless the State has consented to jurisdiction.

III. CONSENT

In Treasure Salvors, the Supreme Court stated that federal judicial determination of ownership (as opposed to resolution of the arrest warrant) was barred by the Eleventh Amendment unless "the State voluntarily advanced a claim to the

artifacts." 458 U.S. at 700, 102 S. Ct. at 3322. Plaintiff argues that the State has voluntarily advanced such a claim in this case and has thus waived its sovereign immunity.

Plaintiff relies primarily on Cobb Coin II, supra, and Illinois Department of Transportation v. American Commercial Lines ("IDOT"), 350 F. Supp. 835 (N.D. Ill. 1972). Neither of those decisions, however, applies to the facts of this case. In Cobb Coin II, the state answered the in rem complaint and filed a counterclaim in which it asserted ownership and requested a declaratory judgment that it was the sole owner of the vessel. 549 F. Supp. at 554. As described by the court, the state "voluntarily appeared in this lawsuit, asked the Court to adjudicate its rights, and conducted extensive litigation on over 30 different issues it claims defeat the interests asserted by the plaintiff including that Florida owns the wrecked vessel and the artifacts." Id. The court held that these actions constituted a consent to a determination of the state's rights by the federal court. In this case, in contrast, the State has not filed a counterclaim or undertaken any voluntary actions other than to assert its sovereign immunity.

In IDOT, the state agency was the plaintiff in an admiralty action seeking recovery for damage to a bridge allegedly caused by the defendants' negligent operation of a tow boat pushing eight barges. One of the defendants filed a counterclaim alleging that the state agency was negligent in its operation of the bridge. The court held that the state agency, by bringing the lawsuit and invoking the federal court's jurisdiction, had voluntarily submitted to the court's jurisdiction and was thus not protected from the counterclaim by reason of sovereign immunity. 350 F. Supp. at 837. The

difference between IDOT and the case at hand is obvious; here, the State did not bring the underlying lawsuit but rather appeared only to protect its interests after plaintiff sought title against "all the world."

In support of its argument that it has not consented to jurisdiction, the State relies on the cases of Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989), and Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989). In each of those cases, the court held that a state which intervened in an in rem action for the limited purpose of moving to dismiss the action on the basis of sovereign immunity did not waive its sovereign immunity. Marx, 866 F.2d at 301; Fitzgerald, 866 F.2d at 17. See also Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923, 926 (E.D.N.C. 1987); Subaqueous Exploration v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597, 614 (D. Md. 1983).

Plaintiff argues that these cases should not be followed because they are inconsistent with the Treasure Salvors opinion. He argues that both Marx and Fitzgerald perpetuated an erroneous statement in Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983). The statement at issue is: "Because this is not a claim against a named state official, and because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit, we need not reach the colorability of the Commonwealth's claim . . . ." 717 F.2d at 8 (emphasis added). This Court does have concerns with the breadth of Maritime's language. (See supra at n. 7.) However, regardless of the merit of this statement, it does not relate to the issue of consent and it certainly does not cast

doubt on holdings in later cases addressing the consent issue. The precedents are unambiguous in holding that when a State's involvement in an in rem action is limited to intervention for the sole purpose of disputing federal jurisdiction pursuant to the Eleventh Amendment, that involvement does not constitute a waiver of sovereign immunity. This Court finds this principle sensible; the State must have a way to protect its interests without waiving those very interests. The Court is thus unwilling to depart from the prior cases. Accordingly, the Court rejects plaintiff's argument that the State has consented to the adjudication of its ownership interests by this Court.

IV. CONCLUSION

Because these actions are against the State without its consent in violation of the Eleventh Amendment, they must be dismissed with respect to the State. The question then arises whether either or both actions should be dismissed entirely. Where the State is the only claimant other than the plaintiff, courts faced with this situation have resolved this question in differing ways. Some courts have dismissed the entire action on the theory that further proceedings in federal court are pointless where the state is the primary claimant other than the plaintiff. See, e.g., Fitzgerald, supra, 866 F.2d at 18-19; Marx, supra, 866 F.2d at 301; Maritime, supra, 717 F.2d at 8. Other courts have permitted the case to continue against "all the world" other than the state which prevailed on its motion to dismiss. See, e.g., State of Florida v. Treasure Salvors, Inc., 689 F.2d 1254, 1256 (5th Cir. 1982); Riebe, supra, 691 F. Supp. at 927; Jupiter Wreck, supra, 691 F. Supp. at 1384. Cf. Treasure Salvors, 458 U.S. at 684, 102 S. Ct. at 3314 ("the fact that the state should

have been dismissed from an action that has proceeded to judgment may not stand against other parties who are not immune from suit"). Where further proceedings in federal court would be suprfluous because the primary dispute involves the State and the State is thus an indispensable party, see Fed. R. Civ. P. 9(b), the Court agrees that the entire action should be dismissed. Accordingly, the in rem action concerning the Seabird shall be dismissed in its entirety.

The situation with respect to the Lady Elgin is different because the State is not the only claimant. The Foundation has also intervened to assert a claim of ownership. Because the Foundation is controlled by plaintiff, the Court has concerns as to whether the conflicting ownership claims of plaintiff and the Foundation constitute a "case or controversy" sufficient to maintain the action in federal court. The Court also does not know whether, in light of this Opinion, the Foundation desires to pursue its claim in this case. Because plaintiff and the Foundation have not yet had an opportunity to fully address these issues, at this time the Court will dismiss the Lady Elgin action solely insofar as it seeks relief against the State.[16]

---

[16]Plaintiff and the Foundation are directed to file written reports with the Court showing why this case should not be dismissed in its entirety. In addition to any other information and argument plaintiff and the Foundation may wish to present, they should address: (1) why the case is not rendered moot by the presence of Harry Zych both as plaintiff and as Executive Director of the sole remaining prospective claimant; (2) why Paul Keller should be allowed to act as attorney both for plaintiff and for the Foundation when plaintiff and the Foundation have asserted inconsistent ownership interests; and (3) why there is any purpose to continuing this action in light of the dismissal of the State from the case. In lieu of such reports, plaintiff and the Foundation may inform the Court

The Court is not without some sympathy for plaintiff's position. It was plaintiff who expended considerable time and resources in pursuing the wrecks. Without plaintiff's efforts, the wrecks might remain undiscovered. The State, in contrast, appears to have sat idly by, showing no interest in the wrecks until plaintiff brought this lawsuit. Plaintiff's contention that he should receive ownership, or at least a salvage award, for his efforts, is attractive.

It is not this Court's function, however, to second-guess policy determinations which have been made by the legislative branch. It could reasonably be concluded that state ownership of abandoned shipwrecks is necessary to protect the wrecks against those divers and salvors who may be unscrupulous.[17] Ensuing legislation making clear the states'

---

that they agree, in light of the Opinion, that the case may be dismissed in its entirety (without, of course, waiving plaintiff's right to appeal from the dismissal of the State).

[17]In introducing the Senate bill on which the ASA was based, Senator Bill Bradley stated:

> The United States is the only country in the world with a substantial number of historic shipwrecks that does not have a [national] law recognizing the importance of preserving some of these sites. There is no Federal law requiring orderly and archeologically correct excavation when salvage does take place. Instead, a finders-keepers principle applies to all shipwrecks in our waters. While this rule makes sense in matters of ongoing maritime commerce, it is as obviously inappropriate for underwater archeological sites as it would be for ancient ruins on land.

Cong. Rec. S. 3988-89 (Mar. 26, 1987), quoted in Owen, The

rights to the shipwrecks does not foreclose divers and salvors from continuing their operations and receiving the fruits of their labors; it merely provides a legal backdrop for those efforts. There is nothing to prevent divers and salvors from reaching agreements with the appropriate states in advance whereby those who discover abandoned shipwrecks will be entitled to retain a certain portion of their discoveries.[18] Such agreements would benefit the divers and salvors, by compensating them for their efforts, as well as the states, by bringing into their possession shipwrecks which might otherwise go undiscovered. Such a scheme would also benefit the public by allowing the state to control, through licensing requirements, the conduct of divers and salvors.

For the reasons described in this opinion, the action must be dismissed for want of jurisdiction.

Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea, 19 J. Mar. L. & Comm. 499, 502 (1988).

[18]The State of Illinois now expressly provides for permits to be granted for the exploration or excavation of abandoned spwrecks. See Ill. Rev. Stat. ch. 127 paras. 133c.01 et seq. See also supra at n. 9.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HON. ILANA D. ROVNER

No. 89 C. 6501 Dec. 12, 1990

Zych v. Lady Elgin

MINUTE ORDER

Pursuant to the Order of December 11, 1990, the Memorandum Opinion and Order of September 13, 1990, is vacated only insofar as it relates to this case. (It remains valid with respect to Zych v. "Seabird", No. 89 C 6502.)

/s/ Ilana D. Rovner
District Judge

STATE LAWSUIT IMMUNITY ACT

AN ACT in relation to immunity for the State of Illinois. P.A. 77-1776, approved Dec. 10, 1971, eff. Jan 1, 1972.

Chap. 127, Illinois Revised Statutes

§ 800. **Short title.** This Act may be cited as the State Lawsuit Immunity Act.

§801. **Immunity of State as defendant or party in court.** Except as provided in the "Illinois Public Labor Relations Act", enacted by the 83rd General Assembly, or except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named", filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

COURT OF CLAIMS

AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named. Laws 2945, p. 660, approved and eff. July 17, 1945.

Chap. 37, Illinois Revised Statutes.

§ 439.1. **Creation of court of claims--Appointment of judges.**

. . . .

§ 439.8. **Jurisdiction.** The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the state founded on any law of the State of Illinois, or upon any regulation thereunder by an

executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Disease Act, or claims for expenses in civil litigation.

(b) All claims against the state founded upon any contract entered into with the State of Illinois.

(c) All claims against the state for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Regents of Southern Illinois University, the Board of Regents of the Regency University System, the Board of Governors of State Colleges and Universities, the Board of Trustees of the Illinois Mathemetics and Science Academy; provided that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of the claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a

vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission of the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency University System, the Board of Governors of State Colleges and Universities, or the Board of Trustees of the Illinois Mathemetics and Science Academy is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act".

(g) All claims filed pursuant to the Crimes Victims Compensation Act.

(h) All claims pursuant to the "Illinois National Guardsman's and Naval Militiaman's Compensation Act".

(i) All claims authorized by Section 14.1(a) of the Illinois Administrative Procedure Act for the expenses incurred by a party in a contested case on the administrative level.

Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO., and THE LADY ELGIN FOUNDATION, INC.,

Petitioners,

v.

ILLINOIS HISTORIC PRESERVATION AGENCY, and ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROLAND W. BURRIS
Attorney General, State of Illinois
ROSALYN B. KAPLAN
Solicitor General, State of Illinois
RITA M. NOVAK
Assistant Attorney General
Counsel of Record
JENNIFER A. KELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2129
Attorneys for Respondents

Printed by Authority of the State of Illinois (P.O. 35618—60—10-22-92)

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Does the Eleventh Amendment bar the district court from adjudicating Illinois' interest in the historic shipwreck of the "Lady Elgin"?

LIST OF PARTIES

Harry Zych, d/b/a American Diving and Salvage Co., was the plaintiff below and is a petitioner in this Court. The Lady Elgin Foundation, Inc., intervened as a claimant below, and is a petitioner in this Court.

The Illinois Historic Preservation Agency and the Illinois Department of Transportation were granted leave to intervene, both as of right and permissively, by the district court and they are respondents in this Court.

The *res* named by Harry Zych as the subject of this litigation is the "unidentified, wrecked, abandoned vessel, believed to be the 'Lady Elgin' which sank in 1860, her engines, boilers, machinery, tackle, apparel and cargo, located within five miles of a point at coordinates 42 degrees, 11 minutes north latitude, 87 degrees, 39 minutes west longitude." (Complaint, R. Doc. 1)

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Introduction	1
Proceedings Below	3
REASONS FOR DENYING THE WRIT	10
THE COURT OF APPEALS CORRECTLY HELD THAT A STATE NEED NOT LITIGATE THE "COLORABILITY" OF ITS CLAIM TO A *RES* TO INVOKE THE ELEVENTH AMENDMENT AS A BAR TO ADJUDICATION OF ITS INTEREST IN THAT *RES*	10
A. This Case Presents No Issue Left Undecided By This Court In *Florida Dept. Of State v. Treasure Salvors, Inc.*	10
B. The Decision Of The Court Of Appeals Is Not Overly Broad, Inconsistent Or Self-Contradictory	13
C. Illinois' Ownership Of The Lady Elgin Is A Hotly Disputed Issue	15
D. The "Showdown Between Zych And Illinois [Is Occurring] In State Rather Than Federal Court"	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	PAGE
Cobb Coin Co. v. Unidentified, etc. Vessel, 549 F. Supp. 540 (S.D. Fla. 1982)	13
Ex Parte Young, 209 U.S. 123 (1908)	13
Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16 (1st Cir. 1989)	13
Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)	10-13
Florida v. Treasure Salvors, Inc., 689 F.2d 1254 (5th Cir. 1982) (on remand)	13
Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 717 F.2d 6 (1st Cir. 1983)	13
People of the State of Illinois ex rel. Illinois Historic Preservation Agency and Department of Transportation v. Harry Zych, doing business as American Diving and Salvage Co., Lady Elgin Foundation, Inc., an Illinois not-for-profit corporation, and Cigna Property and Casualty Insurance Co., a Connecticut corporation, No. 92 CH 8493 (Circuit Court of Cook County, Illinois, County Department, Chancery Division)	16
Sindia Expedition v. The Sindia, 895 F.2d 116 (3d Cir. 1990)	13
Treasure Salvors, Inc. v. The Atocha, 569 F.2d 330 (5th Cir. 1978)	11
Zych v. Wrecked Vessel Believed to be the "Lady Elgin" etc., et al., 960 F.2d 665 (7th Cir. 1992)	13

Constitutional Provision

U.S. Const. amend. XI ..... *passim*

Statutes

The Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.* 14

The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* 14

The Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 133c.01 *et seq.* (1991) ... 14-15

The Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991) 15

The Human Skeletal Remains Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 2660 *et seq.* (1991) 15

Other

13 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3524 at 157 (2d ed. 1984) 10

No. 92-30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY ZYCH, d/b/a AMERICAN DIVING & SALVAGE CO., and THE LADY ELGIN FOUNDATION, INC.,

Petitioners,

v.

ILLINOIS HISTORIC PRESERVATION AGENCY, and ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

Under the heading "Facts" in their Joint Petition for Writ of Certiorari, petitioners Harry Zych and the Lady Elgin Foundation, Inc. state:

> One fact, however, is crucial. It is that the *Lady Elgin* is not and never has been an "abandoned" wreck. The Court of Appeals here expressly noted that the ship was insured by Aetna Insurance Company at the time of her loss, that Aetna paid the

> owner of the vessel for the loss and thereby acquired title to the wreck by subrogation, and that Aetna instructed its agents not to abandon the *Lady Elgin*. (Slip op. at 3, App. 4). In 1990, petitioner Lady Elgin Foundation purchased title to the wreck from CIGNA Insurance Company, Aetna's successor. (Slip op. at 5, App. 6)

(Jnt. Pet. 4)[1] Whether or not the Lady Elgin is or has ever been abandoned has yet to be litigated as between the adverse parties before this Court. This issue will be determined in the course of the lawsuit currently pending between these parties in state court. (*See infra* at 16) Respondents, the Illinois Historic Preservation Agency and the Illinois Department of Transportation, maintain that the Lady Elgin was and is abandoned.

The issue of "abandonment" has only been litigated as between petitioners themselves (*see infra* at 8), concerning which the Court of Appeals stated:

> Once the district court dismissed Zych's claims against Illinois, there followed litigation between Zych and the Foundation having at most the trappings of adversariness. Zych contended that the Lady Elgin is an abandoned shipwreck, and the Foundation contended that it is not. The district court ruled for the Foundation, concluding that Aetna, which instructed its agents not to abandon the Lady Elgin, never intentionally surrendered its interest as subrogee of the vessel's owner. 755 F. Supp. 213 (1991); 1990 U.S. Dist. LEXIS 16760.

(App. 6)

---

[1] Respondents cite to the Joint Petition for Writ of Certiorari as "Jnt. Pet. ____." Respondents cite to the Appendix in the Joint Petition for Writ of Certiorari as "App. ____."

Proceedings Below

On August 28, 1989, Zych filed an *in rem* action pursuant to 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h). (R. Doc. 1) In the caption of the complaint, he described the wreck as "the unidentified, wrecked, and abandoned vessel" believed to be the Lady Elgin. (*Id.*) He also described the wreck as "abandoned" three more times in the body of the complaint. (*Id.* at ¶¶ 3, 6, 7)

Zych sought to be declared the owner in possession of the wreck under the common law of "finds." (*Id.* at ¶ 10) In the alternative, he sought a salvage award for the work he had performed on the wreck. He prayed:

> 1. that he "be put into possession of the wreck and other property, and that all other persons, firms, and corporations or governmental agencies be enjoined from interfering with [his] title, possession and property";
>
> 2. that his "title or salvage award be confirmed against all claimants and all the world";
>
> 3. that "all governments, governmental agencies, states, persons, firms or corporations claiming an interest in the wreck be cited to appear . . . and show cause why possession should not be delivered to [him], as having full title and that [he] be put into full possession and its title confirmed"; and
>
> 4. that, in the alternative, he "be awarded a full and liberal salvage."

(*Id.* at pp. 2-3)

The district court entered an order directing issuance of a warrant for arrest of the shipwreck *in rem* on August 28, 1989. (R. Doc. 5) On October 5, 1989, Zych moved for an order of default. (R. Doc. 13)

Before the district court could rule on the default motion, the Illinois Historic Preservation Agency ("IHPA") and the Illinois Department of Transportation ("IDOT") (collectively "Illinois") moved to intervene and enter a restricted appearance pursuant to Rule E(8) of the Supplemental Rules of Admiralty and Maritime Claims. Illinois sought to contest the district court's jurisdiction to adjudicate its interest in the Lady Elgin. (R. Doc. 19) The court granted Illinois' request to intervene for the limited purpose of contesting its jurisdiction on July 18, 1990, finding Illinois to have satisfied the requirements for both intervention as of right and permissive intervention. (R. Doc. 100)

IDOT has jurisdiction over and responsibility for all of the rivers and lakes of Illinois in which Illinois or its people have any right or interest. Ill. Rev. Stat. ch. 19, ¶ 52 (1991). IDOT is also the trustee empowered to exercise jurisdiction and control over the bed of Lake Michigan which is held in trust for the people of Illinois. Ill. Rev. Stat. ch. 19, ¶ 71 (1991).

IHPA bears responsibility for maintaining historically significant properties and historic interests of Illinois. Ill. Rev. Stat. ch. 105, ¶ 533a (1991). IHPA also has the exclusive right to regulate, explore, excavate or survey archaeological resources, including shipwrecks, found upon or within any public lands. Ill. Rev. Stat. ch. 127, ¶¶ 133c1, 133c.02 (1991).

Illinois contested the district court's jurisdiction to adjudicate its interest in the Lady Elgin. (R. Doc. 19) Illinois also filed a Fed. R. Civ. P. 12(b)(1) motion to dismiss petitioner Zych's suit in its entirety. (R. Doc. 19, Exh. A; R. Docs. 22, 35) Illinois claimed an interest in the shipwreck under the Abandoned Shipwreck Act of 1987, 43

U.S.C. §§ 2101 *et seq.*, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.*, the Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 133c.01 *et seq.* (1991), the Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991), and the Human Skeletal Remains Protection Act, Ill. Rev. Stat. ch. 127, ¶¶ 2660 *et seq.* (1991). (R. Doc. 22 at 3) It then advanced the Eleventh Amendment as a bar to the adjudication of its interests in federal court, and further asserted that it was an indispensable party without which the district court could not adjudicate petitioner Zych's claim of title to the shipwreck. (R. Docs. 22 at 5-6, 35) Therefore, Illinois sought dismissal of Zych's suit in its entirety.

Illinois' intervention and claim to the shipwreck presented petitioner Zych with the following problem described by the Court of Appeals:

> To show entitlement to salvage or ownership under the law of finds, [Zych] needed to show that the Lady Elgin is an abandoned wreck. If it is, then Zych prevails over all other private claimants but the state may take the prize. If the Lady Elgin is an abandoned wreck, then the eleventh amendment may prevent litigation against Illinois in federal court, and if he moves to state court Illinois has a powerful claim on the merits, subject to the requirement that it show that the wreck is "embedded", see § 2105(a)(1) and *The Seabird*, 941 F.2d at 529-30. If, however, the wreck is not abandoned, then other private persons may have claims superior to Zych's.

(App. 5-6)

"To hedge his bets" (App. 6), Zych, "and some friends" (*id.*), formed the Lady Elgin Foundation, Inc. on January 12, 1990, "in order to pursue another avenue of gaining possession of the wreck" (R. Doc. 110 at 4; R. Doc. 112, Exh. A). Zych served as its executive director, his wife

served as its secretary, and a friend served as its treasurer. (R. Doc. 112, Exh. C) Zych's attorney also served as the attorney for the Foundation. (R. Doc. 83)

While Zych had alleged that the Lady Elgin was abandoned, his Foundation asserted that the ship had not been abandoned and that it had title to the shipwreck. (*Id.*) The Foundation maintained that the Aetna Insurance Company ("Aetna") had obtained title to the ship in 1860 when it paid on the loss of the ship, and that CIGNA Property and Casualty Insurance Co. ("CIGNA"), the successor to Aetna, had executed an agreement with the Foundation whereby it had transferred its ownership interest to the Foundation in return for twenty percent of the proceeds of the sale of property and artifacts from the shipwreck. (*Id.*) The Foundation, in turn, contracted with Zych for salvage of the ship. (*Id.*)

On May 2, 1990, Zych's Foundation sought leave to intervene in Zych's suit. (R. Doc. 83) As an alternative to this motion, the Foundation, on August 16, 1990, moved for leave to file a claim of ownership to the wreck pursuant to Rule 6(C) of the Supplemental Rules for Admiralty and Maritime Claims, and an answer to Zych's complaint. (R. Docs. 103, 104, 105)

On September 13, 1990, and prior to ruling on the Foundation's motion to intervene, the court dismissed Zych's complaint against Illinois with prejudice. (App. 73) The court determined that Illinois had a "colorable" claim of title to the shipwreck and, therefore, that the Eleventh Amendment barred adjudication of its interest in the ship. (App. 50-70) The court further ruled that Illinois had not waived its Eleventh Amendment immunity by appearing in the case and seeking to protect its interests. (App. 70-73)

The court declined to dismiss the case in its entirety, although it expressed doubt as to whether a "case or controversy" existed as between Zych and his Foundation (App. 74), a relationship the Court of Appeals subsequently described as "having at most the trappings of adversariness" (App. 6). The court ordered Zych and his Foundation to file written reports addressing why the case was not then rendered moot by the presence of Zych both as a plaintiff and as executive director of the Foundation, whose interest was purportedly adverse to Zych's. (App. 74 n.16) The court also ordered Zych's attorney to explain how he could continue to represent both Zych and Zych's Foundation, which was opposing Zych's claim to the shipwreck. *Id.* Finally, it requested Zych to inform it how the case could continue following Illinois' dismissal from the suit. *Id.*

Zych's attorney responded to the court's request on September 21, 1990. (R. Doc. 112) He stated that a case or controversy existed between the parties. (*Id.* at 2-4) He submitted copies of the Foundation's certificate of incorporation (*id.* at Exh. A), and its corporate by-laws (*id.* at Exh. B). He also submitted the minutes of the Foundation's Board of Directors meeting of September 20, 1990, at which meeting Zych resigned as executive director of his Foundation and was appointed its secretary, his friend resigned as treasurer and was appointed executive director, and his wife resigned as secretary and was appointed to serve as treasurer. (*Id.* at Exh. C) Zych's attorney stated that he perceived no ethical problem in representing both Zych and his Foundation, that a case and controversy existed between Zych and his Foundation, and that both Zych and his Foundation waived their right to separate counsel. (R. Doc. 112 at 2-4, and Exhs. D & E) Zych's attorney also urged the district court to reconsider its dis-

missal of Zych's claims as against Illinois. (R. Doc. 112 at 4-5)

On September 26, 1990, the court issued a minute order and memorandum opinion declining to reconsider its dismissal of the action as against Illinois. (R. Docs. 113, 114) The court also permitted the Foundation to file a claim of title to the shipwreck. (R. Doc. 114) It conditioned the Foundation's right to proceed in the case upon its retention of independent counsel and upon Zych's continued pursuit of his claim to title in the ship. (R. Doc. 113 at 3-4)

On November 19, 1990, the Foundation submitted its memorandum in support of its claim to the shipwreck (R. Doc. 118), and Zych filed his response in opposition to the Foundation's claim of title to the Lady Elgin. (R. Doc. 117) The Foundation submitted with its memorandum a stipulated statement of facts. (R. Doc. 118)

On November 26, 1990, the district court requested the United States, which had been granted leave to intervene as of right for the purpose of defending the constitutionality of the Abandoned Shipwreck Act of 1987 (R. Doc. 99), and Illinois to appear at a status hearing to discuss their involvement in the action between Zych and his Foundation. At the hearing, both the United States and Illinois declined to participate. Illinois did so on the ground that the suit had already been dismissed with prejudice as against it on Eleventh Amendment grounds. (R. Doc. 128 at 10, 11)

On December 11, 1990, the district court entered judgment declaring that "the Foundation is the sole owner of the shipwrecked Lady Elgin." (App. 35) The court stated that Illinois, by declining to participate in the November 26, 1990 hearing, had waived its opportunity to respond to the Foundation's claim of title to the shipwreck. (App. 32-34)

The following day, December 12, 1990, the district court entered an order vacating that portion of its September 13, 1990 order dismissing the suit as against Illinois. (R. Doc. 130)

Illinois moved, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the court's December 11, 1990, judgment. (R. Docs. 131, 132) Illinois sought to make clear that the order, consistent with the Eleventh Amendment, did not adjudicate its interest in the Lady Elgin. (*Id.*) Illinois also moved, in the alternative, to vacate the December 11, 1990 judgment pursuant to Fed. R. Civ. P. 60(b)(4), arguing that if the December 11, 1990 judgment did adjudicate Illinois' interest, it was void as violative of the Eleventh Amendment. (*Id.*)

On January 4, 1991, the court entered an order denying Illinois' motion, but granting an agreed motion filed by Zych and his Foundation to clarify that the court retained jurisdiction to adjudicate Zych's claim for a salvage award. (App. 24-35)

On February 12, 1991, Zych filed a motion for preliminary and permanent injunctive relief prohibiting any person from interfering with his exclusive salvage rights. (R. Doc. 146) On March 11, 1991, the district court granted Zych a preliminary injunction. (R. Doc. 149)

Illinois filed a notice of interlocutory appeal from this order, as well as from previously entered orders essential to the preliminary injunction order, on March 25, 1991. (*See* App. 7)

On May 3, 1991, the district court *sua sponte* extended the effective date of the preliminary injunction during the pendency of the appeal. The court also stayed Zych's right to commence salvage operations during the pendency of the appeal.

On April 3, 1992, the United States Court of Appeals for the Seventh Circuit vacated the district court's preliminary injunction order. (App. 1-11) The Court of Appeals held that the district court was without jurisdiction under the Eleventh Amendment to adjudicate Illinois' interest in the wreck of the Lady Elgin.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY HELD THAT A STATE NEED NOT LITIGATE THE "COLORABILITY" OF ITS CLAIM TO A *RES* TO INVOKE THE ELEVENTH AMENDMENT AS A BAR TO FEDERAL ADJUDICATION OF ITS INTEREST IN THAT *RES*.

A. This Case Presents No Issue Left Undecided By This Court In *Florida Dept. Of State v. Treasure Salvors, Inc.*

Contrary to the petitioners' contention (Jnt. Pet. 7), and as correctly explained by the Court of Appeals (App. 9-10), this case presents no issue left undecided in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) ("*Treasure Salvors*"). Indeed, eight justices agreed that the Eleventh Amendment prevents a federal court from adjudicating whether a State owns property, irrespective of the "colorability" of the State's claim to the property, absent the State's consent. 458 U.S. at 699-700 (Stevens, J., joined by Burger, C.J., and Marshall and Blackmun, JJ.); 458 U.S. at 702-703 (White, J., joined by Powell, Rehnquist and O'Connor, JJ.). *See* 13 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3524 at 157 (2d ed. 1984). The holding in *Treasure Salvors* is dispositive of the instant case.

In *Treasur Salvors,* a diver located a 17th century Spanish galleon on the floor of the ocean more than three miles off Florida's coast. Litigation between the finder and

the United States resulted in the determination that the wreck was located in international waters. *Treasure Salvors, Inc. v. The Atocha*, 569 F.2d 330 (5th Cir. 1978). Following this determination, the district court issued a warrant for the arrest of certain artifacts from the galleon that were in the possession of two Florida officials. The State of Florida intervened and moved to quash the warrant on the ground that the Eleventh Amendment barred the action. The district court denied the motion and rejected Florida's claim of ownership. The Court of Appeals for the Fifth Circuit affirmed.

This Court granted certiorari to review the following question: "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." 458 U.S. at 682. The Court answered that question in two parts:

> We hold that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

Id.

Justice Stevens authored the plurality opinion, which was joined by Chief Justice Burger and Justices Marshall and Blackmun. He declared that "the Court of Appeals improperly adjudicated the State's right to the artifacts," and concluded "[t]o the extent that the court determined the State's ownership of the artifacts as part of its Eleventh Amendment analysis, its judgment is reversed." *Id.* at 700.

Justice White, who was joined by Justices Powell, Rehnquist and O'Connor, concurred in the part of the judgment concerning the lower court's lack of authority to have adjudicated the State's interest in the artifacts. *Id.* at 702-703 and n. *. Justice White explained:

> The appellate court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. By holding that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent," [citation omitted] the Court properly rejects this novel conception of the Eleventh Amendment.* The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a State are permitted by the eleventh amendment if the result is that the State loses." [Citation and footnote omitted.]

Id. at 702-703. In the footnote to this discussion, Justice White stated: "I therefore concur in the judgment of the Court only insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. On this point, all Members of the Court, except Justice Brennan, are in agreement." *Id.* at 703 n. *. Justice Brennan maintained that the Eleventh Amendment did not apply because the plaintiffs were Florida citizens. *Id.* at 700-702.

No member of the Court expressed the view that a State must litigate the "colorability" of its claim to property in federal court before successfully invoking the Eleventh Amendment as a bar to adjudication of its in-

terests. Justice Stevens, writing for the plurality, discussed "colorability" only in the context of determining whether the district court, in issuing process against the State officials, had actually issued process against the State under the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. Significantly, although concluding that the State officials had no "colorable" basis on which to retain possession of the artifacts, thereby upholding issuance of the warrants, Justice Stevens unequivocally declared that the lower court was without jurisdiction to have adjudicated the State's claim of title to the artifacts.

Response to the Court's holding in *Treasure Salvors* has not been "inconsistent and confused" as petitioners contend. (Jnt. Pet. 9) The erroneous interpretations of one district court, *Cobb Coin Co. v. Unidentified, etc. Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982), and the Court of Appeals for the Third Circuit in one case, *Sindia Expedition v. The Sindia*, 895 F.2d 116 (3d Cir. 1990), stem not from the unsettled status of the law, but from a misreading and misunderstanding of the Court's decision. Courts that have properly read the *Treasure Salvors* opinion have applied it correctly and consistently. *Zych v. Wrecked Vessel Believed to be the "Lady Elgin" etc., et al.*, 960 F.2d 665, 669-70 (7th Cir. 1992) (App. 9-10); *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989); *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (1st Cir. 1983); *Florida v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1255-56 (5th Cir. 1982).

B. The Decision Of The Court Of Appeals Is Not Overly Broad, Inconsistent Or Self-Contradictory.

Petitioners assert that the Court of Appeals' statement that "[a] judgment declaring that the state possesses no

interest in particular property is a judgment 'against one of the United States' for Constitutional purposes" is overly broad. (Jnt. Pet. 11) They fail, however, to explain in what sense they believe it to be overly broad, and they cite no authority in support of their assertion.

The Court of Appeals reasoned, entirely consistently, that once Illinois asserted an interest in the wreck of the Lady Elgin, the Eleventh Amendment operated as a bar to adjudication of Illinois' interest, irrespective of the strength or merit of Illinois' claim. (App. 7, 10, 11) The Court of Appeals unequivocally, and correctly, rejected the argument—advanced by petitioners here and below—that Illinois must prove in federal court that its claim of title to the wreck is "colorable" before it can successfully invoke the Eleventh Amendment as a bar to the suit. Each of the Court of Appeals' statements quoted by petitioners reflects this view. To the extent petitioners contend otherwise, they misread the Court of Appeals' opinion. (Jnt. Pet. 11-13)

Finally, the Court of Appeals correctly stated that there is no doubt Illinois has a claim to the wreck of the Lady Elgin. (App. 11) The Lady Elgin sank in Lake Michigan off the coast of Illinois in 1860. (App. 2) Petitioners Zych and his Foundation conceded that the wreck is at least on (if not embedded in) State submerged lands. (Appellees' brf. of Zych and his Foundation at 25) The wreck was lost for nearly 130 years. (R. Doc. 1 at ¶ 4) Zych described it as abandoned in the caption of his complaint and he alleged it to be abandoned throughout the complaint. (R. Doc. 1 at ¶¶ 3, 6, 7) Illinois claimed an interest in the shipwreck under the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.*, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.*, the Archaeological and Paleontological Resources Protection Act, Ill. Rev. Stat. ch. 127,

¶¶ 133c.01 *et seq.* (1991), the Rivers, Lakes, and Streams Act, Ill. Rev. Stat. ch. 19, ¶¶ 51.9 *et seq.* (1991), and the Human Skeletal Remains Protection Act, Ill. Rev. Stat., ch. 127, ¶¶ 2660 *et seq.* (1991). (R. Doc. 22 at 3)

Zych and his Foundation clearly sought to adjudicate Illinois' interest in the wreck. Indeed, Zych's complaint prayed:

> 1. ". . . that all other persons, firms, and corporations or *governmental agencies* be enjoined from interfering with [Zych's] title, possession and property";
>
> 2. that "title or salvage award be confirmed against *all claimants* and *all the world*";
>
> 3. that "all *governments*, *governmental agencies*, *states*, persons, firms or corporations claiming an interest in the wreck be cited to appear . . . and show cause why possession should not be delivered to [Zych], as having full title and that [he] be put into full possession and its title confirmed"; and
>
> 4. that, in the alternative, he "be awarded a full and liberal salvage."

(R. Doc. 1 at ¶ 10) (Emphasis added.) Illinois was also the "principal target" of the district court's injunction. (App. 11) Zych and his Foundation sought to conclusively adjudicate the merits of Illinois' interests in this case and they sought to forever bind Illinois to the district court's adjudication of title to the wreck. (Appellees' brf. of Zych and his Foundation at 8-10)

C. Illinois' Ownership Of The Lady Elgin Is A Hotly Disputed Issue.

Petitioners next assert that "[i]t is beyond argument that the State of Illinois has no 'conceivable' or colorable claim to the Lady Elgin," and that "[t]he undisputed fact

is that the vessel is and always has been owned by private parties, namely CIGNA and the Lady Elgin Foundation." (Jnt. Pet. 14) To the contrary, these are hotly disputed issues and they currently are the subject of the on-going state court action discussed below.

D. The "Showdown Between Zych And Illinois [Is Occurring] In State Rather Than Federal Court."

The Seventh Circuit concluded its opinion with the observation "The showdown between Zych and Illinois will occur in state rather than federal court." (App. 11) That showdown is currently underway. Illinois filed suit to adjudicate its title to the Lady Elgin on September 2, 1992. *People of the State of Illinois ex rel. Illinois Historic Preservation Agency and Department of Transportation v. Harry Zych, doing business as American Diving and Salvage Co., Lady Elgin Foundation, Inc., an Illinois not-for-profit corporation, and Cigna Property and Casualty Insurance Co., a Connecticut corporation*, No. 92 CH 8493 (Circuit Court of Cook County, Illinois, County Department, Chancery Division). Thus, contrary to petitioners' assertion, this controversy will be resolved in a state forum. (Jnt. Pet. 15-16)

CONCLUSION

For all of the foregoing reasons, the Court should deny the Joint Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General, State of Illinois
ROSALYN B. KAPLAN
Solicitor General, State of Illinois
RITA M. NOVAK
Assistant Attorney General
Counsel of Record
JENNIFER A. KELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2129
Attorneys for Respondents